FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, ALSO KNOWN AS JACK ATCHLEY, PETITIONER,

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 26, 1960

CERTIORARI GRANTED MAY 23, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, ALSO KNOWN AS JACK ATCHLEY, PETITIONER,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

THE PEOPLE OF THE STATE OF CALIFORNIA

v.

VERNON ATCHLEY, Veron aka Jack

INFORMATION—Filed August 19, 1958

The said Vernon Atchley, Veron aka Jack, is accused by the District Attorney of Butte County, by information, found this 19th day of August, 1958, of the crime of Violation of Section 187 of the Penal Code of the State of California; committed as follows: The said Vernon Atchley, Veron aka Jack, did on or about the 3 day of August, 1958, at Butte County and State of California, and before the filing of this information, wrongfully, willfully, and unlawfully kill a human being, to-wit, Marcella Katherine (Farris) Atchley with malice aforethought, all of which is contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

/s/ C. Keith Lyde, District Attorney of Butte County. By —— ——, Assistant District Attorney.

[fols. 2-3] [File endorsement omitted]

[fol. 4] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

MOTION TO SET ASIDE INFORMATION—Filed August 29, 1958

Now Comes Veron Atchley, also known as Jack Atchley, defendant, in the above entitled action, by and through Albert M. King, his attorney, and moves the Court for its

order to set aside the Information filed herein by the District Attorney of the County of Butte on the 19th day of August, 1958, upon the following grounds:

That said defendant is charged by the District Attorney in said Information with the crime of Violation of Section 187 of the Penal Code of the State of California, for which he has not been legally committed by a magistrate in that:

a) No evidence was introduced at the preliminary hearing of said defendant from which there is reasonable or probable cause that said defendant committed acts amounting to a violation of Section 187 of the Penal Code;

b) That the evidence introduced at the preliminary hearing of said defendant at most would sustain the filing of an information for a violation of Section 192 of the Penal Code, to wit: manslaughter.

Dated: August 29, 1958.

/s/ Albert M. King, Attorney for Defendant.

[fol. 5] AUTHORITIES IN SUPPORT OF MOTION

Section 995 Penal Code

A motion to set aside an Information is authorized when an accused is committed without reasonable or probable cause and a motion may be made to set aside an information found without reasonable or probable cause. If the trial court denies such a motion, a petition for writ of prohibition may be filed in the Appellate Court.

People vs. Hayden, 118 Cal App. 2nd 744

A valid indictment (Information) cannot be found on mere speculation and conjecture.

Bunker vs. Superior Court, 96 Cal. App. 2nd 107

An information based on incomplete evidence is unauthorized.

Dong Haw vs. Superior Court, 81 Cal. App. 2nd 153

Section 187 of the Penal Code

While a charge of murder under Section 187 of the Penal Code would necessarily include the offense of manslaughter under Section 192 of the Penal Code, evidence of the commission of the crime of manslaughter under Section 192 of the Penal Code would not support the charge of murder, which is not a necessarily-included offense under a charge [fol. 6] of manslaughter.

Section 1159 of the Penal Code

[fol. 7] In the Superior Court of the State of California in and for the County of Butte

Minute Entry—August 29, 1958.

No. 33496

Present: Hon. J. F. Good, Judge, District Attorney Keith Lyde, Court Clerk Phyllis W. Duncan, Court Reporter Donald Duensing, Bailiff David A. Neill. Defendant is present in court with his counsel Albert M. King.

Case is called for arraignment and plea. Defense Attorney King files written Motion to Set Aside the Information in open court, and reads said motion in open court, and orally cites additional authorities. Upon request of defense counsel, argument on said motion are set for Wednesday, September 3, 1958 at 10 a.m. Defendant remanded to custody of the Sheriff.

[fols. 8-86] In the Superior Court of the State of California, in and for the County of Butte

Order Denying Motion to set aside the Information—September 3, 1958

This is the date to which case was continued for hearing arguments on defendant's motion to set aside the information. Said motion is heard on oral argument by Mr. King and denied.

On direction of the Court, the Clerk arraigns the defendant and reads the information in open court. When questioned by the Clerk, the defendant states he is being prosecuted under his true name, and in person pleads not guilty of the offense charged in the information, and waives statutory time for trial. Case is set for trial with jury Wednesday, November 12, 1958 at 10 a.m., seven days estimated for trial. Defendant is remanded to custody of the Sheriff.

[fol. 87] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

No. 33496

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

VERON ATCHLEY aka JACK ATCHLEY, Defendant

VERDICT OF THE JURY—December 9, 1958

We, the jury in the above entitled action find the defendant Veron Atchley aka Jack Atchley guilty of the crime of murder as charged in the information and fix the degree as First degree.

Dated: December 9, 1958.

Signed Earl C. Howard, Foreman.

* Note. If this form is used insert degree.

When asked by the Clerk if this was their verdict, the jury indicate that it is. Upon request of counsel for the defendant, the jurors are polled individually by the Clerk and all answer that this is their verdict.

Given instructions are filed and refused instructions are dated. Court orders jurors and two alternates to return to the Courtroom on Thursday, December 11, 1958 at 10 a.m. for the second phase of the trial to determine the penalty. Jury is admonished not to discuss this case until all issues are determined in this matter.

Out of the presence of the jury, Court, counsel and defendant convene. Defendant makes oral motion for mistrial be-

[fols. 88-98] cause the jury was improperly instructed by the Court and counsel for the People were guilty of misconduct. Said motion is denied by the Court. At 17:40 p.m. Court adjourns. Defendant is remanded to the custody of the Sheriff.

[fol. 99] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

Instructions requested by Defendant and not given for reasons stated.

/s/ A. B. Ware, A. B. Ware, Judge.

[fol. 100] DEFENDANT'S INSTRUCTION No. 1

Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find him guilty, as to the degree of his offense.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Same as Peo's 21

(Caljic 305-B)

[fol. 101] DEFENDANT'S INSTRUCTION No. 2

Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine whether the murder was of the first or second degree.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Same as Peo's 3

(CALJIC No. 302)

[fol. 102] DEFENDANT'S INSTRUCTION No. 3

When upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or of the second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Same as Peo's 7

(CALJIC 305-A)

[fol. 103] DEFENDANT'S INSTRUCTION No. 4

To deliberate means to take into consideration, to ponder and to weigh, although not necessarily prudently or wisely, such reasons for or against a proposed action as come to the mind of a person contemplating the action and whose capacity to exercise judgment has not been destroyed by emotion or passion.

To premeditate a certain action means to think about it before doing it, so that one reaches a positive decision to take the action and conceives a plan or a method by which he will undertake to achieve the intended result.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered by 1958 C.A.L.J.I.C. # 303 to be given

(CALJIC No. 303-A (New))

[fol. 104] DEFENDANT'S INSTRUCTION No. 5

When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and the jury finds that the killing was murder, they may consider the evidence of provocation for such bearing as it may have on the question whether the murder was of the first or second degree.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Same as Peo's 14

(CALJIC 311-B)

[fol. 105] DEFENDANT'S INSTRUCTION No. 6

Where the murder is by 'lying in wait' and the act causing death was intentional, it is murder in the first degree. A killing "by means of lying in wait" is not murder of the first degree unless it is first established that it is murder. Only then can the question arise whether it is 'murder of the first degree' because perpetrated by 'lying in wait'.

You are instructed that the mere fact that the defendant was waiting and watching for the decedent to return home in a place of concealment is not sufficient in itself to find the defendant 'lying in wait' within the meaning of the law.

The term 'concealed' is not synonymous with 'lying in wait'. If the defendant concealed himself for the purpose of shooting the decedent unawares, he is 'lying in wait' but you must first find that a murder was established before the question of 'lying in wait' can arise.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered by Peo's 8a & 8b (C.A.L.J.I.C. 302E, 302EE).

(People vs. Miles 55 Cal P. 207)

(People vs. Thomas 41 Cal 2d 470)

[fol. 10] DEFENDANT'S INSTRUCTION No. 7

Murder of the second degree must be distinguished not only from murder of the first degree, on the one hand, but from manslaughter, on the other. Manslaughter shortly will be defined for you, and you will note than an essential feature of that offense, which distinguishes it from murder, is that the killing be done without malice.

If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditation, that is, without the wilful, deliberate and premeditated intent to take life which is an essential element of first degree murder, and is not perpetrated by means of poison, or lying in wait, or torture, and is not committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, then the offense is murder in the second degree. In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree (in any of the following cases).

1. When the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another, or

2. When the circumstances attending the killing show an abandoned or malignant heart.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered by Peo's 9, 10, 11 & 12.

(CALJIC No. 308 (1, 2))

[fol. 107] DEFENDANT'S INSTRUCTION NO. 8

Manslaughter is the unlawful killing of a human being without malice. One kind of manslaughter, the definition of which is pertinent to this case, is voluntary manslaughter, being that which is committed upon a sudden quarrel or heat of passion.

——, ——, Judge of the Superior Court.

Refused—covered

(CALJIC 308-A)

[fol. 108] DEFENDANT'S INSTRUCTION NO. 9

Manslaughter is the unlawful killing of a human being without malice. Two kinds of manslaughter, the definitions of which are pertinent in this case, are:

1. Voluntary manslaughter, which is that committed upon a sudden quarrel or heat of passion.

2. Involuntary manslaughter, which is that done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

——, ——, Judge of the Superior Court.

Refused—covered

(CALJIC 308)

[fol. 109] DEFENDANT'S INSRTUCTION NO. 10

To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be considerable, that is to say, it must be of such a character and degree as naturally would excite and arouse the passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

"Heat of Passion", as the term is used in our law, means such a passion as naturally would be aroused in the mind of an ordinarily reasonable person of average disposition in the same or similar circumstances as those in question, and such as would cause him to act rashly, without reflection and deliberation, and from passion rather than from judgment. Hence the defendant may not set up his own standard of conduct and be permitted to justify or excuse himself merely because his passions were aroused. To apply the proper standard by which to judge the conduct of the defendant, you will ask and answer whether or not the ordinarily reasonable person, if placed in the same position in which the defendant found himself and if knowing what the defendant then knew, would have been thrown into a heat of passion.

If there was provocation, but of slight and trifling character, and of a nature not calculated to naturally arouse the passion, or if sufficient time elapsed between the provo- [fol. 110] cation and the fatal blow for passion to subside and reason to resume its empire, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of such slight or remote provocation will not mitigate the offense to manslaughter.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—same as Peo's 11.

(CALJIC 311)

[fol. 111] DEFENDANT'S INSTRUCTION No. 11

It is lawful for a person who is being assaulted, and who has reasonable ground for believing that bodily injury is about to be inflicted upon him, to stand his ground and defend himself from such attack, and in doing so he may use all force and means which he believes to be reasonable

necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to me imminent.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered by Peo's 16

(CALJIC No. 621)

[fol. 112] DEFENDANT'S INSTRUCTION No. 12

A person who has been attacked and who is exercising his right of lawful self-defense is not required to retreat, and he not only may stand his ground and defend himself against the attack but may also pursue his assailant until he has secured himself from danger if that course appears to him, and would appear to a reasonable person in the same situation, to be reasonably and apparently necessary; and this is his right even though he might more easily have gained safety by withdrawing from the scene.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered by instructions on self-defense relating particularly to homicide.

(CALJIC 622)

[fol. 113] DEFENDANT'S INSTRUCTION No. 13

A witness may be impeached by contradictory evidence or evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is

completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

——, ——, Judge of the Superior Court.

Given:

Given as Modified:

Refused: Covered

(Baji No. 34)

[fol. 114] DEFENDANT'S INSTRUCTION No. 14

In respect to any attempt to impeach a witness not a party to this action by showing that on some former occasion he made a statement or statements that were contradictory of his testimony here, you may consider the evidence of such a contradictory statement only for the purpose of testing the credibility of the witness, not for the purpose of proving the truth of the statement.

When the witness, whose impeachment in this manner is attempted, is a party to the action, if the asserted prior statement constituted an admission against interest, evident of the statement may be considered in determining the truth or falsity thereof as well as for the purpose of testing the credibility of the witness.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered Peo's # 1-10

(Baji No. 34-A)

[fol. 115] DEFENDANT'S INSTRUCTION No. 15

The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you for only one purpose, namely, in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-11

(Baji No. 34-B)

[fol. 116] DEFENDANT'S INSTRUCTION No. 17

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-14

(CALJIC No. 56)

[fol. 117] DEFENDANT'S INSTRUCTION No. 18

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-19

(CALJIC 21)

[fol. 118] DEFENDANT'S INSTRUCTION No. 19

A presumption is a deduction which the law expressely directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or circumstantial; but unless so controverted, the jury is bound to find in accordance with the presumption.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-4

(CALJIC No. 40)

[fol. 119] DEFENDANT'S INSTRUCTION No. 20

The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-43

(CALJIC 8)

[fol. 120] DEFENDANT'S INSTRUCTION No. 21

The People and the defendant both are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered—Peo's #1-47

(CALJIC No. 3)

[fol. 121] DEFENDANT'S INSTRUCTION No. 22

The Court instructs you that the Court will take Judicial knowledge that the moon was full on the night of Aug. 2, 1958, and that it arose about 8:40 P.M. in the evening of that day.

——, ——, Judge of the Superior Court.

Not give

Covered

/s/ A. B. Ware.

[fol. 122] DEFENDANT'S INSTRUCTION No. 23

The term "Concealed" is not synonymous with "lying in wait". If a person conceals himself for the purpose of shooting another unawares he is 'lying in wait'.

——, ——, Judge of the Superior Court.

Given:
Modified:
Refused: Covered

(People vs. Miles 55 cal. P 207)

[fol. 123] DEFENDANT'S INSTRUCTION No. 24

To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

——, ——, Judge of the Superior Court.

Given:
Modified:
Refused: Covered

(Section 20, California Penal Code)

[fol. 124] DEFENDANT'S INSTRUCTION No. 25

Intent, how manifested, and who considered of sound mind. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused: Covered

(Section 21, California Penal Code)

[fol. 125-126] DEFENDANT'S INSTRUCTION No. 26

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict.

———, ———, Judge of the Superior Court.

Given:

Modified:

Refused: Covered

(CALJIC No. 26)

[fol. 127] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

CRIMINAL INSTRUCTION No. 1

(Butte Co. approved instructions)

Proposed by People 1

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Given.

——, ——, Judge.

(BAJI NO. 1-2)

FILED DECEMBER 9, 1958.

Harriett James, County Clerk, By B. Wyman, Deputy.

[fol. 128] CRIMINAL INSTRUCTION No. 2

Proposed by People 1

You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any

of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for both (~~all~~) parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, either (~~any~~) party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

Given.

——, ——, Judge.

(CALJIC NO. 2)

[fol. 129] CRIMINAL INSTRUCTION No. 3

Proposed by People 1

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Given.

——, ——, Judge.

(CALJIC No. 6)

[fol. 130] CRIMINAL INSTRUCTION No. 4

Proposed by People 1

Evidence may be either direct or indirect. Direct evidence is that which proves the fact in dispute directly, without any inference or presumption, and which in itself, if true, conclusively establishes that fact. Indirect evidence is that which tends to establish the fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact at issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and must be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose acts is in question, the course of business, or the course of nature."

The word "propensity" as used in this instruction means [fol. 131] any "natural or habitual inclination or tendency."

Given.

——, ——, Judge.

(CALJIC No. 25)

[fol. 132] CRIMINAL INSTRUCTION No. 5

Proposed by People 1

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime

consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a ~~crime~~ crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions. You are not permitted, however, on circumstantial evidence alone, to find the defendant guilty of ~~the~~ (~~any~~) any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant [fol. 133] is guilty of the crime, but are irreconcilable with any other rational conclusion.

Given.

_____, Judge.

(CALJIC No. 24 & 27)

[fol. 134] CRIMINAL INSTRUCTION No. 7

Proposed by People 1

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative

number of witnesses, but in the relative convincing force of the evidence.

Given.

——, ——, Judge.

(CALJIC No. 53)

[fol. 135] CRIMINAL INSTRUCTION No. 8

Proposed by People 1

You are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, an interest in the outcome of the case, or bias or prejudice against one of the parties.

Given.

——, Judge.

(CALJIC No. 52)

[fol. 136] CRIMINAL INSTRUCTION No. 9

Proposed by People 1

A witness may be impeached by contradictory evidence or by evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

Given.

——, ——, Judge.

(CALJIC No. 54)

[fol. 137] CRIMINAL INSTRUCTION No. 10

Proposed by People 1

In respect to any attempt to impeach a witness not a party to this action by showing that on some former occasion he made a statement or statements that were contradictory of his testimony here, you may consider the evidence of such a contradictory statement only for the purpose of testing the credibility of the witness, not for the purpose of proving the truth of the statement.

When the witness, whose impeachment in this manner is attempted, is a party to the action, if the asserted prior statement constituted an admission against interest, evidence of the statement may be considered in determining the truth or falsity thereof as well as for the purpose of testing the credibility of the witness.

Given.

——, ——, Judge.

(BAJI No. 34-A)

[fol. 138] CRIMINAL INSTRUCTION No. 11

Proposed by People 1

The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you for only one purpose, namely, in judging the credibility of that witness. The fact of such conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness.

Given.

——, ——, Judge.

(CALJIC No. ~~54-B~~) 54-B

[fol. 139] CRIMINAL INSTRUCTION No. 12

Proposed by People 1

Discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its sigificance. But a wilful falsehood always is a matter of importance and should be seriously considered.

Given.

——, ——, Judge.

(BAJI No. 27-a)

[fol. 140] CRIMINAL INSTRUCTION No. 13

Proposed by People 1

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material fact unless, from all the evidence, you shall believe that the probability of proof favors his testimony in other particulars.

Given.

——, ——, Judge.

(CALJIC No. 54-C)

[fol. 141] CRIMINAL INSTRUCTION No. 14

Proposed by People 1

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives

the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

Given.

——, ——, Judge.

(CALJIC No. 56)

[fol. 142] INSTRUCTION No. 15

Proposed by People 1

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

Given.

——, ——, Judge.

(CALJIC No. 23)

[fol. 143] CRIMINAL INSTRUCTION No. 17

Proposed by People 1

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more

probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

Given.

——, ——, Judge.

(CALJIC No. 51)

[fol. 144] CRIMINAL INSTRUCTION No. 16

Proposed by People 1

The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him.

Given.

——, ——, Judge.

(CALJIC No. 29-D)

[fol. 145] DEFENDANT'S INSTRUCTION No. 16

The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination.

——, ——, Judge of the Superior Court.

Given:

Modified:

Refused:

(CALJIC No. 36)

[fol. 146] CRIMINAL INSTRUCTION No. 38

Proposed by People 1

The fact that an information has been filed against the defendant and that he has been placed on trial on the charge alleged in the information is no evidence whatever tending to show guilt, and is not to be considered by you in ascertaining or determining the facts relative to the truth of the charge.

Given.

——, ——, Judge.

[fol. 147] CRIMINAL INSTRUCTION No. 39

Proposed by People 1

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Given.

——, ——, Judge.

(CALJIC No. 21)

[fol. 148] CRIMINAL INSTRUCTION No. 40

Proposed by People 1

The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely pos-

sible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

Given.

——, ——, Judge.

(CALJIC No. 22)

[fol. 149] CRIMINAL INSTRUCTION No. 41

Proposed by People 1

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

Given.

——, ——, Judge.

(CALJIC No. 26)

[fol. 150] CRIMINAL INSTRUCTION No. 42

Proposed by People 1

In arriving at a verdict in this case the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies ~~solely~~ with the court or with the jury to be determined upon a further hearing

and the matter of penalty must not in any way affect your decision at this time as to the innocence or guilt of the defendant.

Given.

——, ——, Judge.

(CALJIC No. 9)

[fol. 151] INSTRUCTION No. 19

Proposed by People 1

An essential element of the crime of which the defendant is accused is intent, the law requiring that to constitute such a crime there must exist a union or joint operation of criminal conduct and criminal intent. However, this does not mean that one must intend all the consequences of his conduct, or that he must know that such conduct is unlawful, to be guilty of a public offense such as that charged against the defendant in this case. The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime and must engage in that conduct knowingly and wilfully.

Given.

——, ——, Judge.

(CALJIC No. 71)

[fol. 152] CRIMINAL INSTRUCTION No. 19-a

Proposed by People 1

In every crime or public offense there must exist a union or joint operation of act and intent. To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive.

Given.

——, ——, Judge.

(CALJIC No. 71 Alt.)

[fol. 153] CRIMINAL INSTRUCTION No. 24

Proposed by People 1

Criminal intent is present whenever a person knowingly and voluntarily performs an act or acts which the law declares to be a crime. It does not require a knowledge that such conduct is wrong and may even exist in the presence of a belief that the act is right and lawful.

Given.

——, ——, Judge.

(CALJIC No. 72-A Alt.)

[fol. 154] CRIMINAL INSTRUCTION No. 25

Proposed by People 1

The intent with which an act is done in manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

For the purposes of the issues now on trial you must presume that the defendant was sane at the time of his alleged conduct which, it is charged, constituted the crime described in the information.

Given.

——, ——, Judge.

(CALJIC No. 73)

[fol. 155] CRIMINAL INSTRUCTION No. 37

Proposed by People 1

Proof of a motive for an alleged crime is permissible and often is valuable, but never is essential. If, after a consideration and comparison of all the evidence, you feel an abiding conviction to a moral certainty that the defendant committed the crime of which he is accused, the

motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which otherwise might be unsatisfactory. Motive may be shown by positive evidence or by facts surrounding the act if they support a reasonable inference. When thus proved, motive becomes a circumstance, but nothing more than a circumstance, to be considered by you. The absence of motive is equally a circumstance to be reckoned with, but on the side of innocence, tending to support the presumption of innocence, and to be given such weight as you deem proper.

Given.

——, ——, Judge.

(CALJIC No. 35)

[fol. 156] People's Proposed Instruction No. 2

People,

vs.

Veron Atchley

Murder is the unlawful killing of a human being with malice aforethought.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured.

301 CALJIC

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 157] PEOPLE'S PROPOSED INSTRUCTION No. 3

PEOPLE,

vs.

VERON ATCHLEY

Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second,

302 CALJIC

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

———

[fol. 158] COURT'S INSTRUCTION

PEOPLE,

vs.

VERON ATCHLEY

All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree.

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

C.A.L.J.I.C. 302A

[fol. 159] COURT'S INSTRUCTION

PEOPLE,

vs:

VERON ATCHLEY

All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

To constitute this kind and degree of homicide the killing must be accompanied by a clear, deliberate intent to take a life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion or other condition such as precludes the idea of deliberation.

The law does not require that such deliberation shall exist for any particular period of time or that any prescribed period of time shall elapse between the formation of the intent to kill and the act of killing. It is necessary only that the act of killing be preceded by, and be the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing.

The law does not undertake to measure in units of time the length of the period during which the thought must [fol. 160] be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such

a choice, and having in mind the consequences, decide to and commit the unlawful act causing death.

CALJIC 303

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 161] People's Proposed Instruction No. 8 (a)

People,

vs.

Veron Atchley

All murder which is perpetrated by means of lying in wait is murder of the first degree.

To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve an intent to take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise.

Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.

CALJIC No. 302-E

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 162] PEOPLE'S PROPOSED INSTRUCTION No. 8 (b)

PEOPLE,

vs.

VERON ATCHLEY

When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death.

CALJIC No. 302-EE

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 163] PEOPLE'S PROPOSED INSTRUCTION No. 6

PEOPLE,

vs.

VERON ATCHLEY

Murder of the second degree must be distinguished not only from murder of the first degree, on the one hand, but from manslaughter, on the other. Manslaughter shortly will be defined for you, and you will note that an essential feature of that offense, which distinguishes it from murder, is that the killing be done without malice.

If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of first degree murder, and is not perpetrated by means of poison, or lying in wait, or torture, and is not committed in the perpetration or attempt to perpetrate arson,

rape, robbery, burglary or *mahem*, then the offense is murder in the second degree. In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree in any of the following cases:

(1) When the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another, or

(2) When the circumstances attending the killing show [fol. 164] an abandoned or malignant heart, or

(3) When the killing is done in the perpetration or attempt to perpetrate a felony other than arson, rape, robbery, burglary or mayhem.

CALJIC 305

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 165] People's Proposed Instruction No. 7

People,

vs.

Veron Atchley

When upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or of the second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

CALJIC 305-A

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 166] PEOPLE'S PROPOSED INSTRUCTION NO. 9

PEOPLE,

vs.

VERON ATCHLEY

Manslaughter is the unlawful killing of a human being without malice. Two kinds of manslaughter, the definitions of which are pertinent in this case, are:

1. Voluntary manslaughter, which is that committed upon a sudden quarrel or heat of passion.

2. Involuntary manslaughter, which is that done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

CALJIC 308

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 167] PEOPLE'S PROPOSED INSTRUCTION NO. 10

PEOPLE,

vs.

VERON ATCHLEY

Manslaughter is the unlawful killing of a human being without malice. One kind of manslaughter, the definition of which is pertinent to this case, is voluntary manslaughter, being that which is committed upon a sudden quarrel or heat of passion.

CALJIC 308-A

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 168] PEOPLE'S PROPOSED INSTRUCTION NO. 12

PEOPLE,

vs.

VERON ATCHLEY

Manslaughter is distinguishable from murder principally in this: That though in manslaughter the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice, either express or implied, which is an essential element of murder, is wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient.

When the mortal blow, though unlawful, is struck in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such a case, even if an intent to kill exists, the law deems that malice, which is an essential element of murder, is absent.

CALJIC 310

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Refused:

[fol. 169] PEOPLE'S PROPOSED INSTRUCTION NO. 11

PEOPLE,

vs.

VERON ATCHLEY

To reduce an intentional felonious homicide from the offense of murder to manslaughter, upon the ground of sudden quarrel or heat of passion, the provocation must be considerable, that is to say, it must be of such a character

and degree as naturally would excite and arouse the passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

"Heat of passion", as the term is used in our law, means such a passion as naturally would be aroused in the mind of an ordinarily reasonable person of average disposition in the same or similar circumstances as those in question, and such as would cause him to act rashly, without reflection and deliberation, and from passion rather than from judgment. Hence the defendant may not set up his own standard of conduct and be permitted to justify or excuse himself merely because his passions were aroused. To apply the proper standard by which to judge the conduct of the defendant, you will ask and answer whether or not the ordinarily reasonable person, if placed in the same position in which the defendant found himself and if knowing what the defendant then knew, would have been thrown into a heat of passion.

If there was provocation, but of slight and trifling char- [fol. 170] acter, and of a nature not calculated to naturally arouse the passion, or if sufficient time elapsed between the provocation and the fatal ~~blow~~ acts for passion to subside and reason to resume its empire, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of such slight or remote provocation will not mitigate the offense to manslaughter.

CALJIC: 311

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified

[fol. 171] PEOPLE'S PROPOSED INSTRUCTION NO. 14

PEOPLE,

VS.

VERON ATCHLEY

Neither the passion of fear, of itself, nor the passion for revenge, of itself, nor the passion induced by and accompanying or following an intent to commit a felony, of itself, nor any or all of these passions, in and of themselves, constitute the heat of passion referred to in the law of manslaughter which I have stated to you. Any or all of such specific emotions may be involved in a heat of passion that dethrones judgment and substitutes impulse and rashness, but also any one or more of them may exist in the mind of a person who acts deliberately and from choice following his own reasoning howsoever good or bad it may be. Hence the law sets up the standard and requires the test that I previously have stated to you for determining whether or not the defendant acted under heat of passion.

CALJIC 311-A

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 172] PEOPLE'S PROPOSED INSTRUCTION NO. 13

PEOPLE,

VS.

VERON ATCHLEY

When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and

the jury finds that the killing was murder, they may consider the evidence of provocation for such bearing as it may have on the question whether the murder was of the first or second degree.

CALJIC 311-B

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 173] People's Proposed Instruction No. 15

People,

vs.

Veron Atchley

The law presumes that a person intends the ordinary, natural and probable consequences of his voluntary acts. This is a disputable presumption and may be overcome by evidence to the contrary. If you should find that the defendant killed Mrs. Katherine Marcella Atchley, then in determining the question of intent it is important that you consider the means by which the killing was accomplished. If you should find that he used a deadly weapon without excuse or provocation and in such a manner as to imperil life, such facts would support on inference of felonious intent, as inference which, however, must be weighed against any contradictory evidence. If and when the evidence shows that one person assailed another violently with a dangerous weapon likely to kill, and which in fact did kill the person thus ~~attached~~ attacked, such evidence gives rise to a presumption that the assailant intended death or other great bodily harm.

That presumption, however, may be overcome by contrary evidence; and any such evidence is sufficient to overcome it which creates in the minds of the jurors a reasonable doubt that the defendant's intent was as so presumed. In

the absence of evidence to the contrary, the presumption must prevail.

CALJIC 307

——, ——, Judge of the Superior Court.

Refused:

Given as Modified:

[fol. 174] PEOPLE'S PROPOSED INSTRUCTION No. 16

PEOPLE,

vs.

VERON ATCHLEY

A homicide is justified and not punishable when committed by a person in the lawful defense of himself, when he has reasonable ground to apprehend that he is in danger of death or great bodily injury and that there is imminent danger of such a design being accomplished. The acts which a person may do in self-defense and justify under a plea of self-defense depend upon the conduct of those involved in the encounter and the circumstances attending it. No fixed rule is applicable to every case, but certain general principles are established as guides for the jury's determination.

The law of self-defense is founded on the principle of necessity, either actual or apparent, and in order to justify the taking of a human life on this ground the slayer, as a reasonable man, must have reason to belief and must believe that he is in danger of receiving great bodily harm; and further, the circumstances must be such that an ordinarily reasonable person, if he were in those circumstances and if he knew and saw what such person in real or apparent danger knows and sees, would believe that it was necessary for him to use, in his defense and to avoid great bodily injury to himself, such force or means as might cause the death of his adversary.

A bare fear that a person's life or limb is in danger is [fol. 175] not sufficient to justify a homicide. To justify

taking the life of another in self-defense, the circumstances must be such as to excite the fears of a reasonable man placed in a similar position, and the party killing must act under the influence of such fears alone. The danger must be apparent and must be present and imminent, or must so appear at the time to the slayer as a reasonable man, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm.

CALJIC No. 322

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 176] PEOPLE'S PROPOSED INSTRUCTION NO. 18

PEOPLE,

vs.

VERON ATCHLEY

The law of this state does not require that a person retreat before he may act lawfully in self-defense. Although one stands his ground or even pursues the adversary until he, the former, has secured himself from danger, if his actions are in lawful, justifiable self-defense, as allowed by and within the limits of the law just stated to you, such actions do not constitute a crime even if they ~~cause death.~~ Under such conditions this rule applies even if it should appear that the ~~self-defense~~ self-defending person might more easily have gained safety by withdrawing from the scene or by flight.

CALJIC 322-A

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 177] PEOPLE'S PROPOSED INSTRUCTION No. 19

PEOPLE,

vs.

VERON ATCHLEY

As the law of self-defense in cases of homicide is based on the reasonable appearance of imminent peril of death or great bodily injury to the person assailed and who thereafter claims to have acted in self-defense, when that peril has passed and when the attacker has withdrawn from the conflict, the person whom he attacked is not justified in pursuing his former assailant or in attacking him. The rights which a person may exercise under the law of self-defense exist only while there is present the reasonably apparent imminent danger to him of death or great bodily injury.

CALJIC 322-B

———, ———, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

———

[fol. 178] PEOPLE'S PROPOSED INSTRUCTION No. 19-A

PEOPLE,

vs.

VERON ATCHLEY

The right of self-defense is not available to a person who has sought a quarrell with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

CALJIC 325

———, ———, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 179] PEOPLE'S PROPOSED INSTRUCTION NO. 20

PEOPLE,

vs.

VERON ATCHLEY

You will note that actual danger is not necessary to justify self-defense. If one is confronted by the appearance of peril which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or great bodily harm, and if a reasonable man in a like situation, seeing ~~and~~ knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether such danger is real or merely apparent. Even if in the light of after-acquired information or from the distance and perspective of the jury box it should appear that there was no actual or only slight danger, that fact would not affect the right of self-defense if the appearance establishing that right, as I have stated them, existed.

CALJIC 327

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 180] PEOPLE'S PROPOSED INSTRUCTION NO. 17

PEOPLE,

vs.

VERON ATCHLEY

The right of self-defense which justified the use of force, even to the extent of killing one's assailant, ceases to exist when there is no longer an apparent danger of further violence on the part of such assailant. Thus where a person

is attacked under circumstances which justify his exercise of the right of self-defense, and thereafter he uses such force upon his attacker as to render the latter incapable of inflicting further injuries, the law of self-defense then ceases to be operative in the former's favor. If, under such circumstances, the person originally attacked thereafter inflicts further injury upon his attacker, such injury is not justified but is unlawful, and if further injury proximately causes the death of the original attacker, the person inflicting it is guilty of a felonious homicide even though his use of force was lawful up to the time that he rendered his assailant incapable of inflicting bodily injury upon him.

CALJIC 324 ~~Alternate~~

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 181] CRIMINAL INSTRUCTION No. 43

Proposed by People 1

The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instructions, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

Given.

——, ——, Judge.

(CALJIC No. 8)

[fol. 182] CRIMINAL INSTRUCTION No. 45

Proposed by People 1

You are here, members of the jury, for the purpose of trying the issues of fact that are presented by the allegations in the information filed by the District Attorney of the County of Butte, and the defendant's plea thereto. This duty you should perform uninfluenced by pity for the defendant, or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial and the law as given by the Court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice. A verdict founded upon sentiments of pity for the accused, or upon public opinion, or public feeling or upon passion or prejudice, or upon conjectures, would be a false verdict. You must therefore, in your deliberations, avoid and put aside those considerations if you are to properly carry out your duties as jurors.

You should keep in mind that the result of your deliberations are of importance both to the accused and to the people of the State of California. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence in the case and that you will reach a verdict founded solely upon such evidence and upon the law as given to you by the court.

Given.

——, ——, Judge.

[fol. 183] PEOPLE'S PROPOSED INSTRUCTION NO. 21

PEOPLE,

vs.

VERON ATCHLEY

Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find him guilty, as to the degree of his offense.

CALJIC 305-B

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 184] CRIMINAL INSTRUCTION NO. 46

Proposed by People 1

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

Given.

——, ——, Judge.

(CALJIC No. 4)

[fol. 185] CRIMINAL INSTRUCTION No. 47

Proposed by People 1

The People and the defendant(s) both (~~all~~) are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion, or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

Given.

——, ——, Judge.

(CALJIC No. 3).

[fol. 186] CRIMINAL INSTRUCTION No. 49

Proposed by People 1

If, after consideration of all of the evidence in this case and the instructions of the Court, you are satisfied of the guilt of the defendant beyond a reasonable doubt, as reasonable doubt has been explained to you, then it will be your duty to find the defendant guilty as so charged or guilty of such lesser offense as may be included in the offense charged, as has been explained to you in these instructions.

Should you not be satisfied of his guilt beyond a reasonable doubt as so explained, then it will be your duty to acquit the defendant.

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman. He will preside over your deliberations and will sign the verdict to which you agree. In a criminal case it is advisable, in the interests of

both the State and the defendant, that a verdict be returned, so that there may be an early conclusion of the case. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room.

Forms of verdicts will be given to you. They have no significance of themselves; they are given to you only in order that your verdict, whatever it may be, will be in proper legal form.

Given.

——, ——, Judge.

[fol. 187] ~~People's Proposed Instruction No.~~

STATEMENT BY COURT

PEOPLE,

vs.

VERON ATCHLEY

~~You are instructed~~ The court takes judicial notice that the Almanac shows that there was a full moon on the night of July 30, 1958, and further, that the moon rose at the hour of 10:16 P.M. on the night of August 2, 1958 and was between three-fourths and a full moon.

Given:

——, ——, Judge of the Superior Court.

Refused:

Given as Modified: given prior to arguments.

[fol. 188] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

No. 33496

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

VERON ATCHLEY aka JACK ATCHLEY, Defendant

VERDICT OF THE JURY—December 9, 1958

We, the jury in the above entitled action, find the defendant Veron Atchley aka Jack Atchley guilty of the crime of murder as charged in the information and fix the degree as First degree.

Dated: December 9, 1958

Signed /s/ Earl C. Howard Foreman.

*Note: If this form is used insert degree.

[fol. 189] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

#33496

THE FOLLOWING ~~Exhibits~~ INSTRUCTIONS WERE GIVEN IN RE PENALTY ASPECT OF TRIAL OF

PEOPLE,

vs.

ATCHLEY

/s/ A. B. Ware, Judge.

Filed December 11, 1958.

Harriett James, County Clerk, By B. Wyman, Deputy.

[fol. 190] PEOPLE'S PROPOSED INSTRUCTION NO. 1

PEOPLE,

vs.

VERON ATCHLEY

The defendant in this case has heretofore been found guilty of the offense of murder in the first degree and it is now the duty of the jury to determine which of the penalties provided by law shall be imposed. In this determination, you will consider all of the evidence of the circumstances surrounding the crime, of the defendant's background and history and of any facts in aggravation or mitigation of the penalty which have been presented to you here in court (weighing and considering the evidence under the applicable rules of law which are and have been given to you in the court's instructions in this case). It is your duty to conscientiously consider all of the evidence in the case in arriving at your decision and verdict as to the penalty in this case. Your verdict must express the individual opinion of each juror.

CALJIC 306

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 191] PEOPLE'S PROPOSED INSTRUCTION NO. 2

PEOPLE,

vs.

VERON ATCHLEY,

It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the

penalty as death, you will so indicate in your verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment and absolute discretion.

Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and discretion of the jury and, in the determination of that matter, the jury must agree unanimously as to which of the two penalties shall be imposed.

CALJIC 306-A

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 192] PEOPLE'S PROPOSED INSTRUCTION NO. 3

PEOPLE,

vs.

VERON ATCHLEY

It is not essential to your choice of either penalty that you find palliating or mitigating circumstances on the one hand, or evidence in aggravation on the other hand. Insofar as selecting the penalty is concerned, the law does not itself prescribe, nor does it authorize me to innovate, any rule circumscribing the exercise of your discretion. The law commits the exercise of your discretion to the judgment and the consciences of you jurors.

People vs. Friend, 47 A.C. 753, 770

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 193] PEOPLE'S PROPOSED INSTRUCTION NO. 4

PEOPLE,

VS.

VERON ATCHLEY

You are instructed that the word "mitigate" is defined in the Third Edition of Black's Law Dictionary, as follows: Alleviation; abatement or diminution of a penalty or punishment imposed by law. "Mitigating circumstances" are such as do not constitute a justification or excuse of the offense in question, but which, in justice, fairness and mercy, may be considered as extenuating or reducing the degree or moral culpability.

Aggravation when used in connection with a crime means an increase in the gravity, severity, or heinouness of the proscribed act, making it in the circumstances of its performance even more reprehensible and serious than the usual crime of the same category.

However, in fixing the punishment at life imprisonment or death, your discretion is not controlled by whether or not you find any evidence of mitigation or aggravation.

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 194] PEOPLE'S PROPOSED INSTRUCTION NO. 5

PEOPLE,

VS.

VERON ATCHLEY

In making a meaningful choice, you may give weight to any consideration whatever which, in the light of the evidence, seems important to you. Without attempting to

name all possible considerations to which you may give weight, I will list some examples:

1. Defendant's age, physical condition, mentality and character.
2. The presence or absence of any provocation for the murder.
3. Intoxication.
4. Your sympathy for, or indignation toward, the defendant including your findings regarding the presence or absence of sorrow, remorse or repentance on the part of the defendant.
5. The objectives of punishment.
6. The consequences of the two possible penalties.

In connection with this factor, the law provides that the Governor may pardon the defendant or reduce his sentence whether the sentence is death or life imprisonment. If the sentence is life imprisonment, however, the defendant may also be paroled, but not until he has served at least seven years.

People v. Byrd, (1954) 42 Cal. 2d 200
Penal Code Section 3046 (Parole)
Const., Art. VII, Sec I (Pardon and Commutation).
People v. Friend (1957) 47 A.C. 753
People v. Brust (1957) 47 A.C. 780

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fol. 195] PEOPLE'S PROPOSED INSTRUCTION No. 6

PEOPLE,

vs.

VERON ATCHLEY

Although no prisoner in prison under a life sentence for first degree murder may be paroled until he has served at least seven calendar years, the actual time served by

such a prisoner depends upon a number of factors, including his prior criminal record and his behavior in prison. The court takes judicial notice that the time served in prison by such persons are as follows:

1955

Median 138 months or 11½ years
Range of middle 80% 96 to 180 months—8 to 15 yrs

1950 to 1954

Median 147 months or 12 years, 3 months
Range of middle 80% 102 to 203 months—8 to 16 yrs 1 month

California Prisoners 1955. Bureau of Criminal Statistics, Department of Justice. Page 45.

——, ——, Judge of the Superior Court.

Given:

Refused:

Given as Modified:

[fols. 196-198] PEOPLE'S PROPOSED INSTRUCTION NO. 7

PEOPLE,

vs.

VERON ATCHLEY

Your verdict as to penalty is your own indivicual appraisal of the punishment that you as an individual in your sole but responsible discretion believe will best serve the interests of justice in view of all of the circumstances of this case. A unanimous verdict is required and your choice—the expression of that discretion—should be exercised with the same deliberation and conscientious reasoning with which you approach all of the duties assumed by your oath as trial jurors. The discretion that the law vests in you should not be controlled by other jurors, though the facts affecting choice should be freely and fairly discussed by you. However, the verdict, if you can agree

upon one, must represent the individual opinion and considered view of what punishment is proper in this case.

——, ——, Judge of the Superior Court.

[fol. 199] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR COUNTY OF BUTTE

Thursday, December 11, 1958.

STATE OF CALIFORNIA,
County of Butte, ss:

No. 33496

PEOPLE,

vs.

VERON ATCHLEY aka JACK ATCHLEY (w/o sec. 187 P.C.)

Present: Hon. A. B. Ware, Judge, Court Clerk B. Wyman, Court Reporter Jack Theakston, Bailiff David Neill, Court convenes at 10:05 a.m.

This case comes on regularly for trial on the ninteenth day thereof before Hon. A. B. Ware, Judge, sitting with a jury, on the issue of penalty, C. Keith Lyde appearing by and through Loyd H. Mulkey, Jr. and Bruce Grinnell as counsel for the People and Joe R. King, Jr. appearing as counsel for the defendant. Defendant is present with counsel. Jury is all present.

People present no evidence in regard to the penalty but stand on the physical and testimonial evidence heretofore produced.

For the defendant: Jim Atchley, heretofore sworn, is recalled and testifies. Defendant rests. People rest.

At 10:30 a.m. Court admonishes the jury and calls a ten minute recess. Defendant is remanded to the custody of the Sheriff. At 10:50 a.m. Court reconvenes in the presence of the jury, all persons present. Defendant is present with counsel. By oral stipulation of all counsel, instructions to be read before arguments of counsel and thereupon Court reads instructions in re penalty issue to the jury.

Attorney Grinnell gives opening argument for the People to the jury. Attorney King gives argument for the defend-
[fol. 200] ant to the jury. At 11:50 a.m. Court admonishes the jury and calls the noon recess and jury is placed in the hands of the bailiff and matron during lunch period. Defendant is remanded to the custody of the Sheriff.

At 1:30 p.m. Court reconvenes in the presence of the jury, all persons present. Defendant is present with counsel. Attorney Mulkey gives closing argument for the People to the jury. Court gives final instructions to the jury. At 1:50 p.m. jury retire for deliberations in re penalty aspect of the trial.

At 1:55 p.m. Court, counsel and defendant convene in chambers out of the presence of the jury to argue points of law. Attorney King renews defendants' motion for mistrial. Said motion is argued by counsel and denied by the Court.

At 3:55 p.m. Court reconvenes, all persons present. Defendant is present with counsel. Jury enters the courtroom and Foreman Howard informs the Court that the jury have reached a verdict. It is orally stipulated by counsel that the verdict may be read before being entered. Thereupon The Clerk reads the following verdict in open Court:

"In the Superior Court of the State of California, in and for the County of Butte

No. 33496

The People of the State of California, Plaintiff,

vs.

Veron Atchley aka Jack Atchley

Verdict of the Jury

[fol. 201] We, the jury in the above entitled action, fix the penalty to be imposed upon defendant Vernon Atchely aka Jack Atchley as death.

Dated: December 11, 1958.

Signed Earl C. Howard, Foreman.

When asked by the Clerk if this was their verdict, the jury indicate that it is. Upon motion of counsel for the defendant, the jurors are polled individually by the Clerk and all answer that this is their verdict. Given instructions filed and refused instructions are dated.

At 3:55 p.m. jury is thanked by Court and counsel and dismissed. Time for Pronouncement of Judgment is set for Tuesday, December 30, 1958 at 1 p.m. Defendant is remanded to the custody of the Sheriff.

Min. Vol.

[fols. 202-209] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

No. 33496

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

VERON ATCHLEY aka JACK ATCHLEY, Defendant

VERDICT OF THE JURY—field December 11, 1958

We, the jury in the above entitled action, fix the penalty to be imposed upon defendant Veron Atchley aka Jack Atchley as death.

Dated: December 11, 1958.

Signed /s/ Earl C. Howard, Foreman.

[fol. 210] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

JUDGMENT—January 7, 1959

The District Attorney, C. Keith Lyde appearing by and through Deputy District Attorneys Loyd H. Mulkey, Jr. and Bruce Grinnell, with the defendant and his counsel, J.

R. King, Jr. and Court Reporter Donald Duensing were present in Court. The defendant was duly informed by the Court that at the time of the trial on the charge in the information herein, the jury by verdict duly returned, filed and entered on December 9, 1958, found the defendant guilty of murder in the first degree and upon a further hearing before the same jury for the purpose of fixing the penalty, the jury fixed the penalty as death by verdict returned, filed and recorded herein on December 11, 1958, and a Motion for a New Trial and Motion To Arrest Judgment having been denied by the Court:

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him and stated no reason, thereupon the Court rendered its judgment as follows:

That Whereas, the said Court finds the defendant Veron Atchley aka Jack Atchley having been duly found guilty in this court of the crime of murder in the first degree as charged in the information herein, and the jury having fixed the penalty as death,

[fol. 211] Now Therefore in accordance with the law in such cases made and provided, It Is Ordered, Adjudged and Decreed that the defendant is guilty as charged, and that the said defendant Veron Atchley aka Jack Atchley is sentenced to suffer the penalty of death by the administration of lethal gas within the walls of the California State Prison at San Quentin, California, in the manner prescribed by law.

It is Further Ordered that the said defendant Veron Atchley aka Jack Atchley be delivered by the Sheriff of Butte County to the Warden of said California State Prison at San Quentin, San Quentin, California, within ten days from time hereof, to be held by said Warden pending decision of the review of his case in any appeal from this judgment in the manner provided by law.

It is Further Ordered that said defendant is remanded to the custody of the Sheriff of Butte County, California.

[fol. 212] Clerk's & Judges Certificates to foregoing paper omitted in printing.

[fol. 213] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

COMMITMENT—Filed January 7, 1959

The People of the State of California, to the Sheriff of the County of Butte, and the Warden of the State Prison of the State of California at San Quentin, Greeting:

Whereas, Veron Atchley aka Jack Atchley, the defendant herein, having been duly convicted in the Superior Court of Said County of Butte of the crime of murder in the first degree, and the penalty having been fixed as death, and judgment having been pronounced against him that he is to be punished by death, to-wit, by administration of lethal gas within the walls of the State Prison of the State of California at San Quentin, California, all of which appearing to us of record, and a certified copy of the judgment being endorsed herein and made a part hereof,

Now this is to command you, the said Sheriff of the County of Butte, to take and keep and safely deliver the said Veron Atchley aka Jack Atchley into the custody of said Warden of the State Prison of the State of California at San Quentin, at some time not more than ten days from the date of the judgment attached hereto, and this is to command you, the said Warden of the State Prison at San Quentin to receive of and from the Sheriff of the County of Butte, the said Veron Atchley aka Jack Atchley, convicted and sentenced as aforesaid, and him, the said Veron [fols. 214-219] Atchley aka Jack Atchley, keep and imprison in the said State Prison of the State of California at San Quentin, San Quentin, California, pending decision on review or appeal of his case. And these presents shall be authority for the same.

Witness my hand the 7th day of January, 1959.

A. B. Ware, Judge of the Superior Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 1-5] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF BUTTE

No. 33496

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

VERON ATCHLEY, also known as JACK ATCHLEY, Defendant

MOTION TO SET ASIDE INFORMATION—August 29, 1958

Oroville, Butte County, California, Friday, August 29th, 1958.

Court called to order at 9:30 a.m. of this day.
Before Hon. J. F. Good, Judge of Said Superior Court.
Phyllis Duncan, Clerk of the Court.
Donald Duensing, CSR, an Official Court Reporter of Butte County.

APPEARANCES:

For the Plaintiff: C. Keith Lyde, District Attorney of Butte County.

For the Defendant: Albert M. King, Attorney at Law, Oroville Inn Arcade Building, Oroville, California.

[fol. 6] The Court: The People of the State of California vs. Veron Atchley.

Mr. King: At this time, Your Honor, I desire to file a motion to set aside the information on behalf of the Defendant Atchley and I am serving the District Attorney and I would like to read this motion to the Court, "In the Superior Court of the State of California, in and for the County of Butte, The People of the State of California, Plaintiff, vs. Veron Atchley, also known as Jack Atchley, Defendant. Motion to set aside information. Now comes Veron Atchley, also known as Jack Atchley, Defendant, in the above entitled action, by and through Albert M. King, his attorney, and moves the Court for its order to set aside the information filed herein by the District Attorney of the County of Butte on the 19th day of August, 1958, upon the following grounds. One, that said defendant is charged

by the District Attorney in said information with the crime of violation of Section 187 of the Penal Code of the State of California, for which he has not been legally committed by a magistrate in that: A, No evidence was introduced at the preliminary hearing of said defendant from which there is reasonable or probably cause that said defendant committed acts amounting to a violation of Section 187 of the Penal Code; B, That the evidence introduced at the preliminary hearing of said defendant at most would sustain the filing of an information for a violation of Section 192 of the Penal Code, to wit: Manslaughter, dated, August [fols. 7-10] 29th, 1958, Albert M. King, Attorney for the Defendant". Attached to the motion are certain authorities, memorandum of points and authorities in support of the motion and I am now prepared to argue the transcript and the authorities.

. . . . . .

[fol. 11] STATEMENT BY MR. KING ON BEHALF OF DEFENDANT

Now let's look at the transcript in this particular case to see whether or not it sustains—that there is evidence which would sustain a reasonable and probable cause of the charged murder. The transcript is very short and the first witness called was Richard Brush and all he said is he was on duty on August 3rd about 2 or 3 o'clock in the morning and he got a report that Mrs. Marcella Katherine Atchley—to go and to investigate a shooting, and he did, and he found her in front of her house; and he examined her body, and she was dead and he found some bullet holes on her, on her person, and he told where they were grouped at one point in her body and she had some blood coming from them. He found some ejected shells near the body, a total of five within a five or ten foot radius and then he went to an autopsy and while he was there he observed some bullet slugs being removed from her body and they were 22 bullets, the slugs were and the autopsy surgeon found three of them; and the house, the place where this took place was in the City Limits of Gridley, and he gives the [fol. 12] time somewhere around 7 minutes after 3 in the morning, and that is the extent as I gather, from his testi-

mony on direct. On cross examination I brought out some —I asked some questions as to where in the yard she was and where was the place in the yard with reference to the house and whether it was out in the yard or on the steps and found out it was on the lawn and near a fence and that is about all the cross examination brought out,—and the shells, five empty shells were found near the body. Outside of these bullet holes that was brought on in cross examination, there was no other scratches or abrasions or bruises of any kind and that is the extent of the cross examination and then Mr. Lyde offered in evidence and it was received, a certified copy of the death certificate which doesn't prove anything more than the fact that she was deceased and that already had been proved by this witness because he said he saw she was dead. Now the next witness, Walter S. Anderson was sworn and he testified that he was a Deputy Sheriff, a Chief Investigator, and that he talked to the defendant on one occasion and when he first talked to him he denied that he had killed the woman and he said he was at home and then later he said that he did do it; and now in the later conversation which was on August 7th and which was at Gridley, I believe on the way to Gridley to his arraignment, I believe, or to a funeral and at that time he said he admitted—at Line 18, Page 8, "He readily admitted that he did? Ans. Yes, sir. Ques. Did he tell you whether he had waited at the house at all for her? Ans. Yes. He said that he had probably been [fol. 13] there about 10 minutes when she drove up. Ques. Did he tell you whether he had the pistol on him while he was waiting? Ans. Yes, he said he had it in his belt. Ques. And then what did he tell you what happened when she came up? Ans. He said that he was waiting under a walnut tree and that he saw the car drive up, that he walked around and confronted her as she came up the walk-way there to the house and that he said his shirt was inside his belt and that she saw the gun and grabbed it out from the belt and that they struggled and that the gun went off. Ques. I see, did he tell you how many times it went off? Ans. Well, he said that while they were first struggling it went off three times and then he sort of pushed her and had the gun and it went off twice more. Ques. Is that his statement to you substantially as it was

given? Ans. Yes, sir. Ques. And you said he pushed her after he got the gun and that it went off twice more after he had it? Is that what he said? Ans. I understood that as he pushed"—I think it should be, "If", "When he got the gun away from her, yes, sir."

The Court: I think it should be "Is". "I understood that as he pushed is when he got the gun away from her, yes, sir".

Mr. King: And then I cross examined him about the caliber of the gun and how many shells it had in it and he said he didn't talk to Mr. Atchley personally about the shooting until the 7th, so his testimony previously about the defendant's supposedly statements is evidently hear- [fol. 14] say, that he had denied shooting her because he said here on Line 1, Page 10——

The Court: (Int.) Those conflicts don't have much to do with this motion.

Mr. King: Conflicts.

The Court: Inconsistencies, you say part of that is hearsay.

Mr. King: Well, it must have been.

The Court: Whatever inconsistencies there might be maybe an element of defense to the charge.

Mr. King: In other words he said he never talked to him until the 7th and that was when he took the trip to Gridley and at that time the gun was found in the yard, and he told them where this struggle took place and so on.

Now the exact charge here in the information is that the defendant Veron Atchley on or about the 3rd day of August, 1958 is accused of the crime of violation of Section 187 of the Penal Code of the State of California; committed as follows: That the said Vernon Atchley did on or about the 3rd day of August, 1958, at Butte County and State of California, and before the filing of this information, wrongfully, wilfully, and unlawfully kill a human being, to wit, Margella Katherine Ferris Atchley with malice of forethought, all of which is contrary—and so on.

Now the evidence, and the only evidence here is that she was killed in a struggle over trying to take the gun away from this man. It is not brought out here in the evidence, [fol. 15] but in the similarity of names I presume it is contended these people were married, that it is not his

sister or some one with the same name; and the fact he was at her home and the fact that she came after he got there would not be in the nature of lying in wait. If he wanted to go home and she is not there and comes ten minutes later, that is not lying in wait.

The Court: Waiting under a walnut tree is slightly different than waiting in the living room of your own home, isn't it, Mr. King?

Mr. King: Well, it might not be.

The Court: At 3 a.m.?

Mr. King: There has been nothing brought out——

The Court: (Int.) That is on Page 8, Line 25.

Mr. King: As I say there has been nothing brought out here—Line 8?

The Court: Page 8, Line 25.

Mr. King: He said he had been waiting under a walnut tree and that he saw her car drive up and he walked around and confronted her.

The Court: Armed.

Mr. King: And this gun in his belt and he said she grabbed —it was inside his belt and she saw the gun and grabbed it out of his belt and they struggled and the gun went off.

The Court: And two shots were fired after he had procured the gun into his own possession.

Mr. King: Two shots went off.

[fol. 16] The Court: Went off or were fired.

Mr. King: And he said he pushed her after he got gun and it went off, that is the evidence, there is no evidence—he pulled the trigger is not in evidence.

The Court: He had the gun and the gun went off twice, they had a struggle and then he had the gun and the gun went off twice.

Mr. King: But she might have pulled the trigger, it doesn't say here.

The Court: The context of that would be that the struggle was over, it went off three times while they were struggling.

Mr. King: There is sufficient evidence here to sustain the information on manslaughter but there is no evidence of premeditation that I can see that would bring this—that would bring this under a charge of murder with malice of forethought. The only evidence here is that there are two people struggling over a gun at an early hour in the front

yard of the home. Now the District Attorney no doubt has some other evidence which he did not choose to bring out, but it certainly doesn't give the defense any inkling of what the charge is about here to bring out evidence of a struggle and then let it go at that. Now further, the only evidence here outside of the fact that the woman is dead is the so called admission of the defendant. In other words the officer relates a certain admission made by the defendant, that is the only evidence here and the cases hold that [fol. 17] just the statement or admission of the defendant alone would not be sufficient to sustain a case of this kind.

The Court: May I have that case?

Mr. King: That would be on a trial, not as far as the preliminary is concerned, but generally admissions of defendants are view with caution.

The Court: I have never seen a case where it was insufficient to sustain a conviction——

Mr. King: (Int.) Without any other evidence.

The Court: It goes to prove the corpus delicti.

Mr. King: But the corpus delicti in this case is not the body of the woman, but the body of the crime and the body of the crime is charged as murder. There is no corpus delicti proved here by any stretch of the imagination except on the alleged admissions of this defendant.

The Court: You have blood drops, you have five shells within five feet of the body, there is other evidence, Mr. King, even in this record, not enough maybe to sustain beyond a reasonable doubt premeditation, but to some extent premeditation arises, doesn't it—of course that is not a fair question; but the mere fact, the standings on the walk at 3 o'clock in the morning waiting for a person to come home, I think is sufficient on a preliminary hearing to——

Mr. King: (Int.) If she got shot at 5 o'clock in the afternoon, it would be different?

The Court: Perhaps not and perhaps yes.

[fols. 18-481] Mr. King: I don't see how the time would have anything to do with it.

The Court: I think the normal pattern of human behavior would enter into any transaction.

Mr. King: I feel the matter should be referred back for further preliminary, this is a serious charge and there is

no reason here why we should rush into a case without any attempt to prove anything except just slice it as thin as possible. There is enough unfairness in these cases without going to that extreme and the District Attorney has all of these facilities and the backing of a state of ten million people against one poor defendant, he ought to have a fair shake and at least have a preliminary to see what he has—to know what the case is about.

* * * * * * *

DENIAL OF MOTION TO SET ASIDE INFORMATION

The Court: Anybody involved in the situation probably knows the situation better than the deputy sheriffs do, however, that is quite beside the point. I do think that insofar as a preliminary hearing is concerned probable and re-sonable cause for the defendant standing trial is shown. The motion to set aside the information is denied. Are you prepared to enter your plea at this time, Mr. King, or Mr. Atchley—do you have your copy of the information?

[fol. 482] Monday, November 17th, 1958.

* * * * * * *

Mr. Mulkey: (Int.) I would ask the Court for a minute order amending the information on its face. It indicates the first name of the defendant to be Vernon and I believe it is Veron.

Mr. King: V-e-r-o-n.

Mr. Mulkey: Be amended to read Veron Atchley.

The Court: The information is amended to read Veron Atchley.

Mr. King: And I believe it appears on the information, he goes by the name of Jack Atchley and he will be so referred to in the proceedings by many witnesses—isn't it on the face of the information (pause). May we have an, "Also known as Jack Atchley" and then when people call him Jack the Jury will know who they are referring to.

The Court: Does the people have any objection to that?

[fols. 483-500] Mr. Mulkey: No, Your Honor.

The Court: All right, the information is amended then to include the amendment of, "Veron Atchley also known as Jack Atchley". Are you ready to proceed, Gentlemen?

* * * * * * *

[fol. 501] OPENING STATEMENT BY MR. GRINNELL ON BEHALF OF PLAINTIFF

Now about 4 o'clock in the morning Chief of Police Charles Gibbs and Walter Anderson and perhaps Larry Gillick arrived at the Atchley home in Palerno. Mr. Atchley was in bed. They asked him to come down to the Sheriff's office to ask him about this that I have just described to you. At that time Mr. Atchley denied that he had been in Gridley that night. He denied he killed his wife. He denied any knowledge whatsoever of this crime.

Mr. King: I object, if the Court please.

Mr. Grinnell: He further stated——

Mr. King: (Int.) Just a moment, Mr. Grinnell. I object, if the Court please, the District Attorney used the work, "Crime". I feel that there has been no proof offered of a crime at this moment and that his remarks are prejudicial.

Mr. Grinnell: Your Honor, the death certificate said she died as a result of multiple gunshot wounds.

The Court: That is not technically necessarily a crime. Your statement will be accepted with the understanding that you mean Mr. Atchley denied any knowledge of this occurrence.

Mr. Grinnell: Of this occurrence, thank you, Your Honor. He was asked if he knew of any one who might have committed this and he said that the only person that he knew [fol. 502] that might have a motive was a man by the name of Braxton Jones, and he was asked how he knew this and he said, "oh" he had heard it through a third party that this man had threatened not only his life but that of Mrs. Atchley's. Now it will be developed during the trial that Braxton Jones is the father of one of these five children to wit Braxton Jones. He was further asked if he had any knowledge about a gun and he stated at that time that he had at one time had a 22 pistol but that he had sold it to his wife Mrs. Atchley for $25 and that she had sold it about a month before this shooting, before this night, to a man by the name of Brown for $30 and that is all the information that he could give us at that time about the shooting of his wife. At about 9 o'clock the next morning this gun was found buried in his back yard.

* * * * * * * *

Mr. Grinnell: Thank you, Your Honor. I am showing you a picture now, People's Exhibit 2 for Identification, so [fol. 503] marked by the clerk last Friday, which is a scene of a back yard to wit the back yard of the Atchley residence in Palermo showing one, two and a portion of the third house that I have referred to, showing a person who will be identified to you as Deputy Sheriff Brown with a stick in his hand pointing to the spot where this gun was uncovered in Atchley's back yard and I have here a picture previously labeled People's Exhibit 2-A for Identification showing that gun as it was found buried in the back yard of the Atchley residence lying in the ground, the only difference being that the rock which Mr. Atchley had placed over it, being removed so that it could be photographed in place. At that time there were some trash barrels in the back of the Atchley residence, you will see two. One here by the front of this house trailer and the other one over on the other side. These garbage cans were examined and at that time about 9:30 the next morning at the time the firearm was found buried under 6 inches of ashes in the trash can to the front of the house trailer, this one, the closest to Deputy Brown, was found this holster, buried under six inches of ashes.

These two objects were then brought to the Butte County Sheriff's Office and about noon, between 11 and 12 o'clock on that Monday morning Mr. Atchley was brought into the room and shown these two objects that I have just [fol. 504] shown to you. He was not told where they were found. He was just shown them. At that time Mr. Atchley changed his story. He then admitted that he had gone to Gridley that night and he admitted hiding the gun where it was found and he told us, we didn't tell him where it was found. However, he denied hiding the holster in the garbage can and said one of the little girls had done it. Later he changed that to say that he had put the holster in the garbage can before he had gone to Gridley and finally he admitted that upon his return from Gridley at 3 o'clock that morning he had gone into the back yard, buried the gun, buried the holster in the ash can, and you will see that the garbage can, the 55 gallon drum, is within 10 feet of

the spot where the gun was found under a large rock. However, he said, he told us that he had not taken this gun to Gridley at all. He told us that he had gone to Gridley about 12:30 that night, that he had observed the car gone, that he drove to Robinson's Corners but did not see his wife and drove on to Palermo, got the gun, came back to Gridley—wait a minute, he didn't get the gun, I am ahead of myself. He drove on to the dance at Robinson's Corners, did not see his wife and returned to 384 Nevada Street to wait the return of his wife, for, as he stated, he had heard that his wife was running around with another man and he wanted to see, he wanted to catch her, so he waited there according to his own words some 25 minutes for her return and as she drove down Nevada Street in front of the house and parked the car in a car port along side the south side of the house, [fol. 505] he waited at the northwest corner of the Atchley house. Mrs. Atchley got out of the car, walked around the fence, which encircles the front yard, came in the front gate and walked up the walk towards the front door with the keys in her hand to open the front door and he stepped out from the corner of the house and confronted her. At that time she pulled a gun from her purse. This gun——

. . . . . .

Mr. Grinnell: I will be happy to. What I am referring to now and I hope you are all aware, are statements that the defendant gave us after we found the gun and at this time he told us that she pulled the gun out of her purse, that he grabbed the gun, that it went off three times, that he pushed her away and got possession of the gun and it went off twice more. We then proceeded to question him further as to whether or not she had the gun or he had the gun. Later that day he admitted that he had, as I have indicated before, gone to Gridley, found his wife not there, gone to Robinson's Corners and then he had gone home, got this gun and returned to wait for his wife, that he carried this gun inside the waist band of his pants in front, that he stepped out from the corner of the house as he said [fol. 506] earlier, however, at this time she didn't get the gun out of her purse, she didn't have it in her hand, but as she came in towards the front door at this time she saw the gun, reached in, got it from inside his pants, that they

strugged over the gun, it went off, she released it, he pushed her away, the gun went off two or three times more.

* * * * * * *

[fol. 507] Mr. Grinnell: Thank you, Your Honor.

I believe I had reached the point, Ladies and Gentlemen, where I told you that Mr. Atchley had been questioned on this Monday following the killing and had been present with the gun and then had told different stories about different pieces of evidence. I believe I finally reached the point where I had told you that he had admitted for the first time that he had actually gone home and got the gun, returned with it and had the gun inside his pants, inside the waist of his pants, when she returned home from taking Mr. and Mrs. Wagner home.

Now, that was on Monday. On the 7th, which is Thursday, Mr. Walter Anderson, our chief investigator in the Butte County sheriff's office, and Mr. John Serpa, our ID officer, took Mr. Atchley to Gridley at his request to view for the last time his wife. On the return from Gridley Mr. Anderson and Mr. Serpa engaged in a conversation, which they will testify to, that Mr. Atchley, as I have indicated earlier, admitted going over. At this time he said that when he returned the second time he parked his car—and it will be identified as a little Nash Rambler—parked his car from a block to a block and a half north of the residence occupied by Mrs. Atch*ely* on the west side of Nevada Street. [fol. 508] He didn't stop the first time. He just drove by and saw that she wasn't there. But when he returned the second time he parked his car about a block or block and a half north on Nevada Street, got out of the car, walked across the street, proceeded south on Nevada Street, walked to the corner of Nevada and Magnolia Street, which is the corner that the Scharsches live on. They live on the southeast corner of Nevada and Magnolia. He walked south to the corner of Nevada and Magnolia, turned left, walked east down Magnolia Street half the width of the block to an alley, an alley that runs north and south behind Mrs. Atchley's residence, turned right into the alley, walked up the alley to a gate in the rear of Mrs. Atchley's and entered the rear of her premises where he waited for her to return. The People have an eye witness who will

testify that she saw a man walk down the street and into the alley at about the time and in just the manner that Mr. Atchley said he did. In addition, the People have the shoes which will be identified as the shoes that Mr. Atchley was wearing that night together with photographs of marks, prints, shoe prints in the dirt at the corner of Nevada and Magnolia where he turned the corner, and again as he turned and entered into the alley. These pictures, these shoes, will be offered in evidence for you to examine to compare the heel prints in the photograph with the heel prints—or with the heel on the shoe itself.

At that time Mr. Atchley repeated in substance the same story concerning the struggle for the gun that he had told [fol. 509-511] on the preceding Monday, that being that he had taken the gun to Gridley, she had seen it, jerked it out of his pants, it had gone off in the struggle, and shot her three times. She fell away or he pushed her away and the gun went off at least twice more.

. . . . . .

[fol. 512] BARBARA LOU FERRIS, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Would you state your full name please?
A. Barbara Lou Ferris.

. . . . . .

Q. How old are you, Barbara?
A. 14.
Q. And you are the daughter of Catherine Marcella Ferris, is that correct?
A. Yes.
Q. Your mother was married to Vernon, also known as Jack, Atchley?
[fol. 513] A. Yes.
Q. Is that correct?
A. (Nodding affirmatively)

Q. Where did you live while your mother was married to Mr. Atchley?

A. Palerno.

Q. Where in relation to a place called or known as Brown's store?

A. What do you mean? Where it was located?

Q. Yes, where the house was located from this place that is known as Brown's store?

A. Across the street down a little ways.

Q. Would you say about a block?

A. Yes.

Q. Would that be about a block east of Brown's store?

A. Yes.

Q. Is that on the Palermo-Honcut road?

A. Yes.

Q. I believe that is the name of it, is that correct?

A. Yes.

Q. Now, were you living with your mother at the time—during the time that she lived at this place out on Palermo-Honcut road about a block east of Brown's store?

A. Yes.

Q. Now, did anything of an unusual nature occur on or about July 29, 1958, Barbara?

A. That is the day we moved to Gridley.

Q. Why did you move to Gridley?

A. Well, just——. Got in trouble with the welfare and she just moved over there and had an argument.

Q. Who did she have the argument with?

A. With Jack.

Q. Now, was your stepfather Mr. Atchley going to move [fol. 514] to Gridley, or was he going to remain in Oroville?

A. He was going to move with us.

Q. He was going to move with you? And did he move with you?

A. No.

Q. Why was that?

A. She just had an argument.

Q. Now, you moved to Gridley then on Tuesday, the 29th of July, is that correct?

A. Yes.

Q. Did Mr. Atchley ever move into this house in Gridley?

A. No.

Q. By the way, was this house located on Nevada Street?
A. Yes.
Q. Do you remember the number of it?
A. 380.
Q. 380?
A. 384 and 380.
Q. Nevada Street, is that correct?
A. Yes.
Q. You say that Mr. Atchley did not move into this house?
A. No.
Q. Now, on Saturday, August 2nd, 1958, were you with your mother that evening?
A. Yes.
Q. Where did you go?
A. Robinson's Corner.
Q. Who went with you?
A. Mr. and Mrs. Wagner.
Q. About how old are they? Do you know approximately?
A. Well, he is 19 and she is 16, I believe.
Q. Are they friends of yours?
A. Yes.
Q. Did your mother go with anyone?
A. No.
Q. Did you go with anyone?
A. No. I went with——.
Q. Other than Mr. and Mrs. Wagner.
[fol. 515] A. Uh-huh (affirmative).
Q. About what time did you arrive at the dance?
A. Around 8:00 I believe, 8:00, 8:30.
Q. Was Mr. Atchley there?
A. No.
Q. Did you see him at any time at the dance that evening?
A. No.
Q. Did your mother dance with anyone that evening?
A. No.
Q. She did not?
A. (Nodding negatively)
Q. Did she appear to be upset about anything?
A. No. She just sat and talked to Colleen but I tried to get her to dance with me and she wouldn't dance.
Q. About what time did you leave the dance?
A. About 12:00.

Q. About 12:00? And where did you go then?
A. Straight home.
Q. Where is straight home?
A. Gridley.
Q. Now, the route that you took to Gridley would that be straight down that road between Robinson's Corner and Gridley? Is that correct?
A. Yes.
Q. About what time if you recall did you arrive home?
A. About 20 after 12:00, 12:30.
Q. Somewhere in that neighborhood?
A. Yes.
Q. Did you see Mr. Atchley when you arrived home?
A. No.
Q. What did you do then?
A. We went in the house and Anita had on my dress so she changed clothes and we were in there listening to the radio.
[fols. 516-520] Q. And then what happened?
A. Then about a quarter to 1:00, well, they left, Mom took Anita and Bob home.
Q. Who was present in the house then when they left?
A. Ernest, my brother.
Q. Who else?
A. That was all. The rest were asleep.
Q. Well, they were present in the house?
A. Yes. But they were asleep.
Q. So that would mean that you and your sister Donna, and Ernest and Brenda were there?
A. Yes.
Q. What did you do then?
A. Well, after they left we ate a sandwich, drunk a glass of milk and went to bed.
Q. You were not awakened then thereafter?
A. No. She told us to go to bed, so that's what we did.
Q. And you did. And that's the last time you saw your mother?
A. That's the last.
Q. Is that correct?
A. Yes.

. . . . . .

[fol. 521] MRS. LORETTA FAY WAGNER, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Mulkey:

Q. May we have your full name please?
A. Loretta Fay Wagner.
Q. And where do you live?
A. 1945 Pearl.
Q. Here in Oroville?
A. Yes.
Q. And you are married?
A. Well, I was, I am getting a divorce.
Q. What is your husband's name?
A. Robert Wagner.
Q. Do you know the deceased in this matter Mrs. Atchley?
[fol. 522] A. Yes, sir.
Q. And were you in company with Mrs. Atchley on the evening of the 2nd of August of this year?
A. Yes.
Q. Where did you first see her that evening?
A. She came to our house.
Q. At the address you previously gave us?
A. Yes.
Q. And was your husband with you at that time? And were you together?
A. Yes, sir.
Q. Did she come alone or in company with any one?
A. She came with the children.
Q. All of her children?
A. Yes, sir.
Q. And about what time in the evening was that?
A. Oh, about 4:15 or 5.
Q. In the late afternoon?
A. Yes.
Q. And what did she do, just make a social call at that time?
A. Yes, she just come socially and we decided we were going to the dance.

Q. At Robinson's Corners?
A. Yes, sir.
Q. And so did you eat at your home?
A. Pardon me.
Q. Did you have supper then at your home?
A. Yes.
Q. Did she remain and have supper with you, her and the children?
A. Yes.
Q. And then did you leave the home?
A. We left the home, we left my home.
Q. About what time?
A. Oh, I would say it was about 6 o'clock.
[fol. 523] Q. And then where did you go?
A. We went to Gridley, to take her children home.

. . . . . .

Mr. Mulkey:

Q. You went to Mrs. Atchley's home in Gridley?
A. Yes, sir.
Q. And whose automobile were you in at that time?
A. I guess it was Mrs. Atchley's.
Q. At least it was the car she drove to your house in?
A. Yes.
Q. And did she drive from Oroville over to her home in Gridley?
A. Yes, sir.
Q. And then did you stop at her home?
A. Yes.
Q. And what did you do there?
A. Well, I had my shorts on and I went in and we changed clothes, I changed my clothes, and Barbara, and I wore one of Barbara's dresses and then we went to the dance.
Q. You say, "We went to the dance," who went?
A. Mrs. Atchley and her daughter Barbara and my husband and I.
Q. The four of you?
A. Yes.
Q. Could you tell us approximately about what time say you left Mrs. Atchley's for the dance?
A. Oh, it was about 8 o'clock.

Q. About 8 o'clock and did you go directly to the dance at [fol. 524] Robinson's Corner?

A. Yes.

Q. Do you recall about when you arrived there?

A. About 8:30 or 9.

Q. 8:30 or quarter to nine?

A. Yes.

Q. And what kind of a car, by the way, was this that Mrs. Atchley was driving?

A. It was a Ford, it was about a 1949 or 1950.

Q. 1949 or 1950 Ford that Mrs. Atchley was driving?

A. Yes, sir.

Q. When you arrived at the dance what occurred?

A. Well, we went into the dance and we didn't have enough money and so we came back.

Q. Did you all get out of the car when you initially got there?

A. Yes.

Q. And went up to the window?

A. Went to the door and we didn't have enough money.

Q. And so what did you decide to do?

A. We decided to come back and we went to this lady's house and she wasn't home and we went to my aunt's house and I borrowed some money.

Q. You borrowed some money from your aunt?

A. Yes.

Q. Here in Oroville?

A. Yes.

Q. And when did you get back to the dance then?

A. Oh, about 9:30 or 10:00.

Q. I see, you came from Robinson's Corner over to Oroville here and borrowed some money and then you went back to the dance and this time, I take it, paid your admis- [fol. 525] sion and went on in, the four of you?

A. Yes.

Q. Now while you were at the dance I take it you and your husband danced.

A. Oh, yes.

Q. Did Mrs. Atchley dance?

A. No, I didn't see her if she did.

Q. What about Barbara?

A. Yes.

Q. A lot or what?

A. No, mostly she just danced with my ex-husband and right at the end this James, oh, well, Stalery came up and asked Barbara to dance and she danced.

Q. Had one dance with him?

A. Yes.

Q. And so far as you know Mrs. Atchley didn't dance with any one?

A. No.

Q. Did you talk with her there at the dance?

A. Yes.

Q. Did she say anything unusual to you?

. . . . . .

Mr. Mulkey:

[fol. 526] Q. You say you talked with her that evening?

A. Yes.

Q. At the dance?

A. Yes.

Q. At Robinson's Corners?

A. Yes.

Q. Who was there when you talked with her, you and she, or any one else?

A. No, just Kay and I.

. . . . . .

Q. And what did she say to you at that time?

A. Well, we got to talking about different things and I don't know, somehow we got on the subject and she asked me—well, she didn't ask me; she told me, "You know," she said, "I have got the funniest feeling, like something is going to happen" and I asked her what was going to happen and she said she didn't know.

Q. Was there any conversation about Mrs. Atchley there at the dance?

A. Not at that time, no.

Q. Later that evening?

A. Yes.

Q. When?

A. When she was taking us home.

Q. Now when you say, "She was taking you home" do you mean from her home to Oroville?

A. Yes.

Q. All right, what conversation—who else was in the car at that time besides you and your husband and she?

[fol. 527] A. That is all.

Q. I see.

A. She just said that her and Jack was having trouble and she was on the welfare and she was scared of Jack and she wanted to get away from him, afraid maybe something was going to happen between them, so that is the reason she said she moved to Gridley.

Q. Now getting back to the dance, you stayed at the dance until about what time, do you recall?

A. Until about 12:15 I guess.

Q. And then where did you go from the dance?

A. To Mrs. Atchley's home in Gridley.

Q. I see, and did you stop there and have a talk or something?

A. Well, we just stopped and I changed my clothes and we just stopped and—rather they put on records and we were showing Kay how to bop and we just stayed there a few minutes.

Q. And then did you get back in Mrs. Atchley's car?

A. Yes.

Q. And she took you back to your home here in Oroville?

A. In Oroville, yes.

Q. Do you recall approximately when she brought you home here?

A. Well, it was about 20 after 12—20 after 1.

Q. About 20 after 1?

A. Yes.

Q. Did she come in when she got over here, come into your home?

A. No.

Q. Just let you out of the car and left?

A. She just left us out.

Q. Now when she left your place about 20 after 1 was [fol. 528] there any one with her in the car?

A. No.

Q. Was she by herself?
A. She was by herself.

. . . . . .

[fols. 529-531] Cross-examination.

. . . . . .

[fol. 532] By Mr. King:

Q. Did you see Kay on Saturday—you say about 5 o'clock [fol. 533] —did you see her any other time that day?
A. Yes, sir.
Q. Where?
A. I seen her once in the morning, she went to my mom's house and I believe she came back in the afternoon, but I can't say for sure whether she did or not but I know she came in the morning and that evening. I believe she came again that afternoon, but I wouldn't, you know, just exactly if she would or not.
Q. Well then, you at least remember three times that she called at your house that day?
A. Yes, sir, I think so.
Q. Now you saw her that morning?
A. Yes.
Q. About what time?
A. Well, about, I will say between 10 and 11 o'clock she come.
Q. And she came to your house, did she?
A. Well, she come to my mother's.
Q. And you talked with her at that time?
A. Yes.
Q. Did you go any place with her that day other than to the dance?
A. No, sir.
Q. Now on Saturday——
A. (Int.) No, I didn't go any where because I kept her children while she went to look for a house.
Q. All right, she was going to move, was she, from Gridley?
A. Yes, sir.
Q. And where was she going to move?

A. Well, she rented a house down on Ithica and she was suppose to move Sunday but this couldn't get the pickup and we were going to move Monday instead.

[fols. 534-536] Q. Going to move back over to Oroville?

A. Yes.

Q. Ithica Street is down towards your present resident, is it?

A. Yes, sir.

Q. And it was near by where she originally moved from when she moved out, and you do know she moved to Palermo?

A. Yes.

Q. You went out there on occasion to see her?

A. Yes.

Q. When she was living at the Atchley house in Palermo?

A. Yes, sir.

Q. Now I understand that you knew that she was going to move from Gridley back over to Oroville?

A. Yes, sir.

[fol. 537] Q. Had you loaned the decedent any money?

A. Yes, sir, I have.

Q. And what day?

A. I loaned it to her on Friday morning.

Q. And how much?

A. I loaned her $20.

Q. And for what purpose?

A. I loaned it to her because she said the kids didn't have anything to eat.

Q. And you don't know whether she had any money out of it or not. Do you know whether she spent it for groceries?

A. Yes, sir, she did.

Q. And when?

A. She spent it that Friday afternoon.

Q. At what place?

A. As I recall I think it was Safeway.

Q. Did you go with her?

A. Yes, sir.

[fol. 538] Q. Now that Friday afternoon was the first, wasn't it?

A. Yes, sir.
Q. How do you happen to recall that it was the first?
A. Because I got my check.
Q. What check?
A. My welfare check.
Q. You also was getting welfare?
A. Yes, sir.
Q. And you loaned her the $20 out of your check?
A. Yes, sir.

. . . . . .

[fols. 539-542] Re-direct examination.

[fols. 543-565] Mr. Mulkey:

Q. Did Mrs. Ferris explain to you why she was moving back to Oroville?
A. Yes, she did, because she was afraid of Jack.

. . . . . .

[fol. 566] Robert Lou Wagner, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[fol. 567] Direct examination.

By Mr. Mulkey:

Q. Your name is Robert Lou Wagner?
A. Yes.

. . . . . .

Q. Just started. And your wife's name is Anita Wagner?
A. Yes.
Q. Are you acquainted with Mrs. Atchley—or, were you acquainted with her prior to her death?
A. Yes.
Q. Did you have occasion on the evenng of the 2nd of August to be out with Mrs. Atchley?
A. Yes, I was out with her.

Q. Where did you first meet her on that evening?
A. She came out to our place.
Q. Where was that?
A. Pearl Street.
Q. Out on Pearl Street here in Oroville?
A. Yes.
Q. Who was she with? Did she have her children with her or was she by herself when she came out to your place?
A. I think she was by herself. Either Barbara was with her—. I don't remember exactly.
Q. Did she come into your home there where you and the wife was?
A. Yes, she came in for a little bit.
Q. Did you then leave in her company, with Mrs. Atchley, you and the wife?
A. Yes.
[fols. 568-569] Q. And go where?
A. Went out to her place first in Gridley.
Q. What occurred at her place?
A. She went and got dressed, Barbara got dressed.
Q. Did your wife get dressed there too?
A. Yes.
Q. Then where did you go?
A. We stayed there for a little while and then went to Robinson's Corner.
Q. You say "we." Who went?
A. Barbara and Mrs. Atchley and my wife.
Q. And you?
A. Yes.
Q. The four of you. And about what time did you get to Robinson's Corner, if you recall?
A. I don't know what time we go there.
Q. Well, you arrived there and——. Did you go right in when you got there?
A. Sit in the car for a few minutes. Then we went on in.
Q. Did you have any difficulty about purchasing some tickets or something?
A. Yes. Didn't have enough money.
Q. So did you go back to the car then after you didn't have enough money?
A. Yes.

[fol. 570] Q. You then got in Mrs. Atchley's car, the four of you, is that right?

A. Yes.

Q. What did you do then?

A. We left there and went to come back here to Oroville. And then I went to the Dog House.

Q. To the Dog House?

A. Yes. I went in there and got a Pepsi.

Q. Where was Mrs. Atchley?

A. They were in the car.

Q. They were in the car?

A. Yes.

Q. And you went in the Dog House?

A. Yes.

Q. What occurred there if anything?

A. Nothing. I just seen Jack there drinking a beer.

Q. You saw Jack Atchley there?

A. Yes.

* * * * * * *

[fols. 571-572] Q. What did you do? You got a Pepsi-Cola?

A. Yes.

Q. You came back out to the car?

A. Yes.

Q. Did you then return to Robinson's Corner?

A. No. We went out on Virginia Street and borrowed some money from my wife.

Q. You borrowed the money. And then where did you go?

A. Went back to Robinson's Corner.

Q. Did you then pay admission and go on into the dance?

A. Yes.

Q. Did Mrs. Atchley dance at all while she was in there?

A. Not that I know of.

* * * * * * *

[fols. 573-575] Cross-examination.

* * * * * * *

[fol. 576] Q. Did you go into the Atchley house in Gridley that night?

A. Before the dance, yes.

Q. You know that little porch at the front of the house?
A. Yes.
Q. There is a very small yard there, isn't there?
A. Yes.
Q. And there is approximately 15 feet from the front gate, not more than 15 feet to the front porch, isn't that about it?
A. Yes, I guess so.

. . . . . .

[fol. 577] Q. What time was it you got to Oroville from Gridley?
A. Twenty after one.
Q. How long did Kay stay at Oroville with you?
A. She just let us off and left.
Q. Wasn't there only just a—probably a few minutes?
A. Just to drop us off.
Q. She didn't come in the house?
A. She didn't come in, she stayed in the car and she left.
Q. How old are you.
A. 19.
Q. You saw Jack out at the Dog House on the way to the dance that night?
A. Yes.

. . . . . .

[fol. 578] Mr. Richard Brush, a witness called on behalf of the People, after being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Will you state your full name please?
A. Richard Oscar Brush.
Q. You are presently employed in the Butte County Sheriff's office, is that correct?
A. Yes, sir.
Q. How long have you been employed there?

A. A little over a year.

Q. Prior to your employment there were you——

A. City Police Department.

Q. Where was that?

A. I was an officer, police officer for the City of Gridley.

Q. For how long?

A. Just under two years.

Q. So that you have been engaged in law enforcement some three years now, is that correct?

A. Yes, sir.

Q. Were you working on August 2nd, 1958?

A. I was.

Q. What was your shift that day?

A. 8 o'clock at night until 4 in the morning.

Q. So that you were working then from 8 o'clock at night through the midnight hours until 4 in the morning, is that correct?

A. Yes, sir.

Q. What area were you working at that time? And what [fol. 579] area are you still working in the county?

A. I have the Gridley, Biggs, Honcut, Richvale area.

* * * * * * * *

Q. At five after two you received a call. Are you sure of the time?

A. Yes, sir.

Q. What did you do then?

A. I proceeded there to 384 Nevada Street.

Q. 384 Nevada Street?

A. Yes.

Q. Where is that located?

[fol. 580] A. That would be the southwest part of Gridley.

Q. About what time did you arrive there?

A. I arrived there exactly 3:07.

Q. At 3:07?

A. Yes, sir.

Q. But you didn't receive the call until when?

A. I am sorry, sir, my mistake. I received the call at 5 after 3 and that was at the time I was at the fire scene. My mistake.

Q. You were at the fire scene at what time then?
A. Around 3 o'clock because I received the call at 3:05.

. . . . . .

[fol. 581] Q. What time?
A. It is 3:05.
Q. You received the call then at 3:05?
A. Yes, sir.
Q. And you had been at the fire before hand?
A. Yes. I just drove through the fire scene there, the fire area.
Q. Then you went to the Atchley residence, is that correct?
A. Yes, sir.
Q. Were there any other officers there when you arrived?
A. At the Nevada Street address?
Q. Yes.
A. No, sir.
Q. You were the first officer to arrive?
A. Yes, sir.
Q. Did you find anything unusual there?
A. I found the deceased, Mrs. Ferris.

. . . . . .

Mr. Grinnell (Questioning witness): Did you make a diagram of the area, and in particular the front of the Atchley house?
A. Yes, sir.
Q. Did you make certain measurements incident to that diagram?
[fol. 582] A. I did.

. . . . . .

Q. Did you have a diagram prepared?
A. I did.
Q. Was that diagram prepared to scale?
A. It was?

. . . . . .

Q. What does that diagram purport to show, Mr. Brush?
A. The deceased's house and her yard area, and particularly the front of her house, where she was found.

Q. And does it also purport to show various measurements?

A. Yes, it does.

* * * * * * * *

[fols. 583-584] Cross-examination.

* * * * * * * *

[fol. 585] Mr. Grinnell:

Q. Would you take a given point and go right around in a circle and explain those measurements that you made?

A. To start off with, from this post—here is the corner post—it would be the southwest corner of the yard—from this post to this post it is 7 foot 7 inches.

Q. What is the significance there? Why did you measure to that post?

A. Well, right in this area here is where the casings, empty casings were found.

Q. Ejected cartridges?

A. Yes.

Q. And you have so indicated those on your diagram, is that correct?

[fol. 586] A. Yes. And also I have had it in a little more blown up for detail here.

Q. And they were found, once again, where?

A. In this area right here, as you see these black dots (indicating on diagram).

Q. Continue on.

A. From this post to the top of the victim's head is 3 feet. From the victim's left elbow to the house was 7 foot, 3 inches. From the victim's right elbow to this post is 7 foot, 1 inch.

Q. When you refer to, "This post", are you talking about the post on the front fence where the walk comes into the front of the house?

A. Yes, sir. However, there is no sidewalk. But it would be the sidewalk area facing west.

Q. Very well.

A. The street, facing the street. Then from the——. Then I measured from the victim's foot here to where the purse was.

Q. Where was her purse found laying?

A. Right on the edge of the sidewalk.

Q. And that is the sidewalk leading from the street into the front of the house?

A. Yes, right here.

Q. Very well.

A. And from her foot to this, to her purse is 3 foot 3 inches. The purse to the front of her house was an even 8 foot. From her fence line, which faces the street, to her house is 16 feet, 2 inches.

Q. That is from the front fence to the front door?

A. Yes, sir.

Q. And then this stoop that Mr. King has referred to, [fol. 587] this front porch, jets out from the house some three feet, is that correct?

A. Yes, sir.

Q. And you have so indicated on your diagram?

A. Yes, sir.

Q. All right. That constitutes or comprises the measurement that you have indicated on the board, is that correct?

A. That's right.

Q. And is the little figure in dark superimposed on the diagram, is that placed there as nearly as possible where you found the victim lying that night?

A. Yes, sir.

* * * * * * *

[fol. 588] A. Yes, sir. Then this colored area right here would be the deceased's body, this color area is the deceased's purse. As I said before, these colored dots here indicate the ejected casings.

Q. And is that diagram that you have drawn up on the left hand enlarged to show the position?

A. Yes, this is an enlarged area of this right here.

Q. Showing the position that those were found in relation to the fence?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Very well. Now, there is one further measurement that you made, Mr. Brush, pursuant to my request, which is not on that diagram. Is that correct?

A. Yes, sir.

. . . . . .

Mr. Grinnell:

Q. Did you make a measurement from the deceased's—Mrs. Atchley's body to the Scharsch's residence?

A. I did.

Q. The window I am referring to.

A. Yes, sir.

Q. And what distance did you find that to be?

A. Well, from where the deceased's foot would have been it is 50 foot, 8 inches. That is right up against the wall [fol. 589] underneath the Scharsch's bedroom window.

Q. Right under their window to where the deceased's body was lying, is that correct?

A. Yes, sir.

Q. Other than that, all of the other measurements are on the board, is that correct?

A. That is right.

. . . . . .

[fol. 590] Recross-examination.

Mr. King: All right. (Questioning witness) This object that you have here, it is printed across here, "Automobile."

A. That's right.

Q. Which you say represents a Ford, '51 Ford, or something of that sort.

A. It is a Ford, yes, sir.

Q. And you say it is a green car?

A. Yes, sir.

Q. You are sure of that color? You saw the car there that morning, did you?

A. I did.

Q. And you were out there, what time, officer?

A. I arrived there at 3:07 in the morning.

Q. When you arrived there were the street lights on?

A. Yes, sir. And also the porch light.

Q. The porch light in this area, in this little covered stoop here.

A. That's positively right.

Q. I will have to get closer to see it but you have a dimension of 3 foot by 5 feet. Is that right?

A. Yes, sir.

Q. And that is a stoop, is a little cement stoop, is it?

A. It is just a——. I don't know what a stoop is.

Q. Perhaps that is an old English expression for a place to step into your doorway.

A. Well, then it is.

. . . . . .

[fol. 591] Q. There is a very well defined walkway here, is there not, in this area coming up to the front door?

A. Well——.

Q. Which is right here. Here is the front door. There is no door or no sides here to this porch, is there?

A. It is just a little——.

Q. Just a roof, a peaked roof over there, over the top of the little cement porch as you call it?

A. Yes.

. . . . . .

Q. This area here, this is the car port, is it not? You didn't extend the line out here?

A. It is not covered. This is open.

Q. But this area is open is it not? I mean it is covered, is it not?

A. Like I say, Mr. King, I didn't pay too much attention to this particular area there.

Q. Well, if I informed you that it is covered—you can go back and look at it again and refresh your memory as to just what it is. It is the same way right now as it was that morning. And there is a little driveway in here, isn't there, where this automobile appears?

A. Yes, sir.

. . . . . .

[fol. 592] Q. This is the front street, there is no sidewalk along this fence?

A. No.

Q. It goes from here over to Scharsch's residence. Now, this fence here comes a long way back out to the back here, doesn't it?

A. Yes, it does.

[fols. 593-594] Q. That is what kind of a fence?

A. Kind of a chicken wire fence with 2 by 4's.

Q. And how high?

A. Oh, this is just approximate.

Q. Yes.

A. It is about like that.

Q. You are indicating about three feet?

A. Yes, sir.

. . . . . .

[fol. 595] Q. You have drawn an enlargement of this area here showing a 4 by 4 post. I take it it is this post here?

A. Yes.

[fols. 596-597] Q. And another 4 by 4 post. You show one, two, three, four, five .22 shell casings?

A. That's right.

Q. Did you pick those up yourself?

A. I did.

Q. Personally?

A. Yes, sir, I did.

Q. I mean, no one gave you any assistance and picked up any?

A. I had them pointed out, maybe two of them. But I picked them up myself and marked them.

Q. You say there is a shed back here. How big is this shed?

A. As you see here it is seven square.

Q. Six feet high at the front and five at the rear you have got written on here. Is that right?

A. Yes, sir.

Q. And there is a little doorway in here, isn't there?

A. Yes.

Q. Is it a woodshed?

A. I don't know.

Q. You didn't look into it?

A. No.

Q. There is a back door here, isn't there?

A. Yes, sir.

Q. In this region?

A. Yes, sir, in this area right here.

. . . . . .

[fols. 598-600] Q. There are some street lights in that vicinity, are there not?

A. Yes, sir, there is.

. . . . . .

[fol. 601] MARTIN SCHARSCH, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Will you state your name please?

A. Martin Scharsch.

Q. Mr. Scharsch, you are a resident of Gridley, is that correct?

A. Yes, sir.

Q. You live on Nevada Street, is that correct?

A. 390 Nevada Street.

Q. Where is 390 Nevada Street from the residence occupied by Katherine Atchley?

A. It is the house—next house north.

Q. The next house north? And your houses are side by side?

A. That is correct.

Q. You are the corner house and her house is next to yours?

A. Yes, sir.

The Court: Pardon me, Counsel. Which house is north of which?

Mr. Grinnell: The Scharsch is north of the Atchley house.

The Court: Thank you.

Mr. Grinnell:

Q. Now, did you know Mrs. Atchley prior to August 2nd, 1958?

A. I had never seen the woman in my life.

[fol. 602] Q. Did you know Mr. Atchley?

A. Never seen the person.

Q. You never saw either one of those people?

A. No, sir.

• • • • • • •

Mr. Grinnell:

Q. Were you awakened by anything?

A. I was awakened by a lady's voice, hysterical kind of voice, saying, "Oh, don't don't."

Q. And that's the first thing that you heard?

A. That's the first thing I heard.

Q. Have you ever measured the distance between your place and the front of the Atchley residence?

A. Well, it was measured, and it measured from 47 feet.

[fol. 603] Q. Now, you didn't know who this was that was crying out at that time?

A. That's right, I didn't.

Q. What did you do when you heard this cry?

A. Well, when I heard this cry, at the same time a gun went off, and it sounded just like a firecracker going bang, bang, bang, bang, bang, bang, bang, and I raised up right fast and looked out, and there was a man standing stooped over with a pistol in his hand shooting. I seen him shoot at least two times more.

Q. Would you stand up as nearly as possible and put yourself in the position of this man that you saw and tell us first of all where you saw him.

A. I saw him just about, oh, say, four feet from the gate close to the walk.

Q. You are talking about the gate you enter into Mrs. Atchley's yard?

A. That's right.

Q. About how far would that be from the front of the house?

A. That would be about eight—around eight feet to the porch.

Q. So this man you saw was closer to the gate than he was to the house?

A. A lot closer, yes, sir.

Q. What was the lighting at that time?

A. They had a porch light on, a very bright porch light, and also the corner light on.

Q. And you could see a man standing in the yard?

A. Yes, sir.

Q. And this man had something in his hand?

[fol. 604] A. This man had a gun in his hand.

Q. And you could see the gun?

A. I could see the gun.

Q. Could you see the woman?

A. No, sir.

Q. You did not see the woman?

A. No, sir.

Q. Other than hearing this hysterical "Oh, don't, don't" you didn't see her?

A. That's all I heard. I didn't see the woman whatever.

Q. And would you now, as I asked you a moment ago, demonstrate to the jury how you saw this man standing as he fired the last two shots that you told us you saw him fire?

A. I seen just the left side from our side of the house from the window. You could only see on the left side.

Q. The left side?

A. The left side. And he was standing forwards pointing down like this shooting (demonstrating)

Q. And you say you saw him fire two shots?

A. That's right. When I hollered I said——.

Q. What did you holler?

A. I said, "What in the hell is going on over there?" And during that—while I said this he was still shooting at least twice more.

Q. Could you see what he was shooting at?

A. No, sir. He was just shooting down.

Q. Did you see Mrs. Atchley's car?

A. I seen the car, yes, sir.

. . . . . .

[fol. 605] Q. Now, what did this man do when you asked him, "What in the hell is going on over there"?

A. He just take a couple of steps backwards and he was out of my sight.

Q. Where did he go?

A. Well, he had to go out in the street.

Q. He went out into the street?

A. Yes. There is a rose trellis over the gate and I couldn't see him no more.

Q. Could you tell what this man was wearing?

A. Yes, sir. He was wearing blue, kind of a, oh, I should say, light blue pants. They wasn't like jeans. It was lighter and a white shirt.

Q. And white shirt?

A. And bareheaded.

Q. Was this shirt a dress shirt?

A. It was a white shirt.

[fol. 606] Q. A white shirt?

A. Outside, the tail out.

Q. The tail was out?

A. Yes. And he was bareheaded.

Q. You are sure of that?

A. Yes.

Q. No hat on?

A. No.

Q. Did this shirt have sleeves on or not?

A. I couldn't say about that.

Q. You couldn't say about that?

A. No, I could not.

Q. But the shirt looked white?

A. Yes.

Q. And you are sure the tail of it, the bottom portion of the shirt was out?

A. It was out.

Q. What did you do then, Mr. Scharsch?

A. I got up and went in the kitchen and called the police.

Q. Who did you call?

A. I called the Gridley police, 5678.

Q. Did you get any response?

A. I did not.

Q. How long did you try to call the Gridley police?

A. Well, ring about four or five times. And then I told the wife—. I didn't turn the light on. I had a flashlight. I said, "I might have made a mistake." I said, "I'll hold

the flashlight and you ring." And she did. Anyway she rung then and still couldn't get no response.

Q. Who did you call then?

A. So that was the second time for the police. So I said, "Well, let's call up the fire department." Looked it up in the directory up there. And so we called them and couldn't get no response. So I went in the front room and looked at the clock and it was just an even 2:30, straight [fol. 607], up 2:30.

Q. And you had already tried to call the police twice and the fire department and got no response?

A. No response.

Q. What did you do then?

A. Then I said to the wife, "Well, I am going to ask the operator to call them." So I called the operator. And so she tried it and she couldn't get them. So she asked me if she should call the sheriff's office. I said yes, to go ahead. So a man answered and said, "This is Sutter County sheriff." So I told him what was going on.

Q. Did you tell him who you were?

A. I told him who I was.

Q. And where you were?

A. That's right. He said, "Well, that's still inside." He said, "Nevada Street, 390 Nevada Street." And he said that that is still inside the city limits, and I said yes and he said all right, "We'll look into it."

. . . . . .

Q. You had not gone outside the house yet?

A. I had not gone outside yet, no. So I went ahead and went to bed and the wife said, "Here comes a car." I said, "All right. You watch it." And I jumped up, put on my clothes and she said, "He stopped, and now he is gone again."

Q. Did you see this car?

A. Well, I hadn't then. I was putting my clothes on. [fol. 608] Q. About how long was this after the shooting?

A. Oh, 20 minutes or so.

Q. What happened then?

A. So I said, "You watch and see which car—which way the car is going." So she said, "He is turning down the next street up"—I don't even know the streets in town, any-

way the next street south, and heading west and turned around the corner headed north and comes back east again and back in front again. And she said, "He is slowing down again." So by then I was out in the kitchen, run out the back door, and he went then east down the block, he went down south anyway past the house and then turned east one block, went up Oregon Street—that's the next street to me there—two blocks on Sycamore and come down Nevada Street again, and I run out and flagged him down.

Q. And did he stop?

A. And he pulled right underneath in the dark of the trees.

Q. Now, that would have been about how long after the shooting?

A. Well, that's about 20 minutes, around somewheres in there.

Q. That is the first time that the car had stopped?

A. Yes.

Q. During the time that you had been watching?

A. Yes, sir. So I stopped him and I said, "Are you from the sheriff's office?" He says, "No. Why?" I said, "Well, there has been a shooting match going on around here." And I said, "I have called the sheriff and I want to find out what's going on. I am waiting for them." He said, "I see a woman laying over there in the yard." I said, "You [fol. 609] what?" He said, "I see a woman laying over there on the lawn." I said, "You don't say." And then I just run over there. And there was a lady laying there on her left side. And I felt her arm and said, "What's going on here?" And then I seen the bullet holes behind her right shoulder. And so I jumped up and on in the house and I called the Butte County sheriff, asked the operator to call the Butte County sheriff.

Q. About what time then did you call the Butte County sheriff's office?

A. Oh, 25 minutes after that. That would bring it, say, around three minutes of 3:00, somewhere in there.

Q. You say three minutes to 3:00?

A. Around five or ten minutes of 3:00.

Q. Before 3:00 o'clock?

A. Yes.

Q. About how long after you called did the officers arrive?

A. Oh, it wasn't very long. It wasn't two or three minutes. Five minutes at the most.

Q. Do you know an officer by the name of Mr. Brush?

A. The first time I seen him, yes, stopped over there. He was the first man.

Q. Was he the first man to arrive?

A. Yes, him and some young officer.

Q. He was the first officer to arrive?

A. Yes.

Q. And he had another officer with him?

A. Yes.

Q. What were the weather conditions that night, Mr. Scharsch?

A. Well, I think it was clear and hot. I know it was hot. [fol. 610] Q. Now, this window that you looked through, that is located in what room of your house?

A. In my southwest corner, southwest corner.

Q. What room is that located in?

A. Beg pardon?

Q. What room is that located in?

A. Bedroom.

Q. That is in your bedroom?

A. That's right.

Q. So your bedroom is next to the——

A. Street. And also to the——

Q. The yard?

A. That's right.

Q. And you look out this window to the south, is that correct?

A. That's right.

Q. All right. Are there any obstructions as you look out your window over into the Atchley yard?

A. Well, there is a fence there and a grape vine. That's the reason we couldn't see the body.

Q. How high is this fence?

A. The fence? Oh, three and a half to four feet, and then the leaves naturally [illegible] of the grape vine was higher yet.

Q. Are those high enough so they would have—or so that they did obstruct your view?

A. That is correct.

Q. They did obstruct your view?

A. Yes, sir.

Q. Then you could or couldn't see a man in the yard?

A. I could see the man in the yard very plainly.

Q. Very plainly?

A. Yes. But I couldn't see the person laying on the [fol. 611] ground because you look down at a slant.

Q. I see. And that was because of this fence?

A. That's right.

Q. Then you could only see what portion of the man, from his knees up, from his hips up?

A. Well, I could see a man completely from——

Q. But you couldn't see the woman on the ground?

A. No, sir, because the man was standing right here, and here is this line. The grape vine was in the way of the body.

* * * * * * *

Q. Now, when this man walked out of the yard what direction did he head—or backed out of the yard?

A. He just backed out. That's all I seen him.

* * * * * * *

[fols. 612-627] Q. Of course, you stated that you didn't know Mr. Atchley at that time?

A. I had not.

Q. Of course, you didn't recognize this man, is that correct, because you didn't know him?

A. I never——

Q. Could you describe physically the build of this man that you saw?

A. Well——

Q. Was he a tall man or a short man?

A. I should say around five foot eight, maybe nine. He is about my weight, around 165. And a long forehead, I seen the long forehead from the side.

Q. As you look across at Mr. Atchley now do you recognize him as the man that you saw in the yard that night?

A. Well, if he turned side view. That's the only way I seen him, was from the side.

Q. You are indicating his left side?

A. That's right, his left side.

Q. That is the side that is more or less turned to you, Mr. Scharsch.

A. Yes.
Q. Would you like to have him stand up?
A. If he don't mind.

(Defendant Atchley standing.)

Mr. King: The District Attorney is forcing the witness to——

Mr. Grinnell:

Q. Is that——
A. Yes, that's the man.

[fol. 628] Direct examination. (Resumed)

By Mr. Grinnell:

Q. Yesterday as I recall, Mr. Scharsch, you testified that this man whom you have identified as Mr. Atchley was wearing a shirt, and you said that the tail of the shirt was out.
A. No. The whole shirt was out.
Q. Did you mean all the way round, or just in back?
A. The shirt was out all the way around as far as I could [fols. 629-639] see on the front, on the left side.
Q. It appeared to be out and it wasn't tucked in?
A. That's right. This side was out anyway on the left.

. . . . . .

[fol. 640] Cross-examination.

Mr. King

Q. Did you give a statement to the sheriff that morning?
A. No, sir.
Q. You didn't talk to the sheriff about the case at all?
A. No, sir, I did not.
Q. Did you talk to Officer Anderson about the case?
A. We talked down here in the courtroom with the accused, and Sheriff—not the sheriff, but Chief Gibbs from Gridley, and Anderson himself.
Q. The sheriff, Chief Gibbs?
A. Not the sheriff.
Q. Oh, excuse me. All right.

A. Anderson.

Q. Anderson, Chief Gibbs?

A. The accused and myself.

Q. The four of you sat there in the sheriff's office, I take it?

A. I don't know what office it was.

Q. It was down in the jail?

A. It was down here somewhere.

Q. How long were you there?

A. Oh, we was there, including sitting downstairs and everything, oh, I say four hours, three and a half, four hours probably.

Q. All of that time the defendant was being questioned?

A. No, sir. We were sitting down there in the little room in the back there and there was no questions going on for [fols. 641-649] an hour and a half anyway before we went upstairs, before it started. And then there was quite an interval between that.

Q. Well, now, just a moment. You did go upstairs to question, as you call him, the accused?

A. Well, yes.

Q. What room did you go into then?

A. I wouldn't know. I wouldn't know one from the other.

Q. Was it in this courthouse?

A. It was in this courthouse.

Q. It wasn't in the jail?

A. Well, I don't know which part—one part from the other.

Q. Isn't it a fact that he went into the interrogation room in the jail?

A. Well, maybe it was. I couldn't say which room is which. It was a small room, that's all.

Q. Did you ask the accused any questions yourself?

A. I did not.

Q. But the sheriff did?

A. The sheriff wasn't there.

Q. Very well. Did Mr. Anderson ask the accused any questions?

A. Mr. Anderson asked him.

Q. He asked him quite a number of question, didn't he?

A. I suppose so, yes.

Q. Did Chief Gibbs ask him some questions?

A. Never said a word, Gibbs never said a word.

* * * * * * *

[fol. 650] Mr. King:

(Questioning witness)

Now you say that you were sound asleep on the night when this happened and on the early morning hours of August 3rd you were awakened out of a sound sleep, is that right—will you answer so that we can get it down here.

A. Yes, sir, that is true.

Q. And you heard, according to your direct testimony yesterday just what?

A. A woman's hysterical voice hollering, "Oh, don't, don't".

[fols. 651-652] Q. That awakened you?

A. That is right.

Q. Now did you hear any conversation previous to that time?

A. Never heard nothing else, Mr. King, before that, that is the only voice.

Q. Now did you hear any conversation after that?

A. No, sir.

* * * * * * *

Q. Now how many shells did you hear go off?

A. I did not count them, all I know is that it went, "Bang, bang, bang, bang, bang, bang, bang, and that is all I can tell you.

* * * * * * *

[fol. 653] Q. Well then, your present testimony is different in one particular, isn't it?

A. No, Mr. King, I said, as I said there, I looked out the window, I seen a man standing there pointing the gun down and he shot at least twice more when I seen it, that was a continuous shooting, there was no pause, it was a continuous shooting, he shot the lady two shots more.

Q. Then your testimony is that there was no break in this chain of shots?

A. There was no break in the shooting, that is what I meant by that.

. . . . . .

[fols. 654-659] Q. There was no break in them?

A. There was no break whatever.

Q. And the last two shots you testified to?

A. I seen him still shooting when I raised up.

. . . . . .

[fol. 660] Q. He looked like he was shooting towards the front end of the car?

A. He was shooting down like this (demonstrating) and from where we were it looked like the tire of the car was right in line also.

Q. Well, you saw that very distinctly?

A. Yes.

Q. Well, now, will you answer my question, was that the front tire of the car?

A. That was the front.

Q. The front of the car?

A. Yes, sir.

Q. But you didn't think at the time the man stopped there in the darkness of the trees that there had been anybody hurt of course?

A. No, we thought that the lady went in the house.

[fols. 661-669] Q. Now you say that she cried out hysterically?

A. That is right.

. . . . . .

[fol. 670] MRS. IVA DELL SCHARSCH, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: And your full name please.

A. Iva Dell Scharsch.

Mr. Mulkey:

Q. Would you state your name, Mrs. Scharsh?
A. Iva Dell Scharsch.
Q. And where do you live?
A. 390 Nevada.
Q. And you are married to Martin Scharsch?
A. Yes, sir.

* * * * * * *

Q. Did you know Mrs. Atchley?
A. I only talked to her for just about half an hour one evening and that is all.
Q. And when was that?
A. That was on a Thursday after she moved there over the weekend.
Q. Was there any conversation with her at that time with reference to her husband?
A. Yes, there was.
Q. Can you tell the jury who was present besides you and her?
[fol. 671] A. Well, Barbara and the other girl, I don't——
Q. (Int.) Another daughter of hers?
A. Yes, another daughter.
Q. I see, and where did this conversation take place?
A. Out in the yard over the fence.
Q. I see, can you tell the jury what was said?
A. Well, she was talking and she said that she was scared of her husband, that he made her leave because he didn't like the kids and they were getting on his nerves and she said that she was scared.
Q. Did she refer to him by any name, her husband?
A. Well, Jack, she called him.
Q. She referred to him as Jack?

A. Yes.

Q. You had not, at this time, met Mr. Atchley, had you?

A. No.

. . . . . .

[fol. 672] Q. Now you were at home on the night of the 2nd, were you not?

A. Yes.

Q. Second of August?

A. Yes.

Q. And did anything unusual occur during that night?

[fol. 673-674] A. Well, before that, before we went to bed you mean?

Q. No, after you went to bed that evening?

A. Well, about 2:25 Saturday morning why we heard a scream, from, shall I say Mrs. Ferris?

Q. Well, you didn't know who it was from at that time, did you?

A. No. A lady then.

Q. You heard a lady's voice or scream?

A. Yes.

Q. And you were in bed at that time?

A. Yes, we were.

Q. And your bed is near a window that is adjacent to the Atchley property, is that right?

A. Yes.

Q. And your husband was sleeping where with relation to the window, were you next to the window or was he?

A. I was next to the window.

Q. You were next to the window and your husband was sleeping in the same bed on the opposite side?

A. Yes.

Q. You heard this and what did you hear, see or observe next?

A. Well, we heard this, this lady scream and then we heard some shots and then we looked out the window and that is what woke us up.

Q. What did you see when you looked out the window?

A. Well, we saw a man shooting.

Q. Could you describe the—do you know anything about the clothing of the man or his appearance?

A. Well, he had on a light shirt and blue pants and that is all I could figure out.

Q. Did you note whether the tail of his shirt was in or out?

A. It was out.

. . . . . .

[fols. 675-677] Mr. Mulkey:

Q. Did you hear any particular language from the woman?

A. Well, we heard her say, "Oh, don't, don't" in a hysterical voice.

Q. Did you see the woman as you looked out the window?

A. No.

Cross-examination.

By Mr. King:

. . . . . .

[fol. 678] Q. Very well, now I want to get that straight, it is very important. Let me go through this, now you heard the scream?

A. We heard her say, "O, don't, don't" and some shots.

Q. Yes, and then you looked out?

A. And then we looked out.

Q. And you didn't actually see the shooting itself?

A. I saw the man shooting after we looked out.

Q. After you looked out, but some of the shots had gone off before.

A. He was shooting when we looked out.

Q. I see.

A. He was shooting.

Q. Was there a break in the chain of shots?

A. No.

[fols. 679-681] Q. You don't remember any break in the chain of shots?

A. There was no pause in the shots.

Q. There wasn't some shots and then——

A. (Int.) No.

Q. And then a pause and then a couple of more shots?
A. No.
Q. That is not so?
A. No.

. . . . . .

[fol. 682] Q. What I am getting at, Mrs. Scharsch, you looked out there but your view was so obstructed that you couldn't see the body, is that what I am to understand?

A. When I looked out I saw the man shooting, he was standing up with the gun pointed down shooting, but I didn't see no body on the ground.

Q. In other words your view was obstructed across there?

A. From her body, but not the man.

Q. How much of the man could you see?

A. I could see almost all of him up here (indicating).

Q. Now you are indicating from his knees up, is that what you want us to believe?

A. When you see something like that you don't try to eye from the foot on up, you just look out and see something.

Q. Of course, that is human nature, isn't it?

A. Yes, it is.

Q. But I want to get some idea of what you saw there and the only way we can do that is by question and answer. Of course you didn't see the whole body of a man standing there then, I take it?

A. Almost all of him, all except maybe his legs, below here some place (indicating).

. . . . . .

[fols. 683-684] Q. But your testimony was that he was about three or four feet from the gate?

A. Around three feet, somewhere around there, I don't remember measuring it.

Q. What did you see the man do?

A. He was shooting.

. . . . . .

[fol. 685] Q. (Int.) Or heard some shots rather.

A. I saw the man shooting, not only hear, I saw him, I looked out.

Q. Did you see Mrs. Atchley?

A. No, I did not see the body.

Q. Well now, did you see her alive before she fell?

A. No, when I looked out all I saw was the man shooting, that is all I saw.

Q. There was a car in the driveway, wasn't there?

A. The lady's car.

. . . . . .

Q. You could see the front end of the car?

A. You could see all of the yard, you could see her car and everything because that was a strong light.

. . . . . .

[fol. 686] Q. Yes, could you see the car?

A. Yes, I could see the car.

Q. From your window over here somewhere (indicating on diagram).

A. Because I thought he was shooting at the tire at the time.

. . . . . .

[fol. 687-694] Q. About what time of day was this shooting?

A. It was about 2:25.

. . . . . .

[fol. 695] DORIS M. THOMAS, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Mulkey:

Q. Will you state your name please?
A. Doris M. Thomas.
Q. Where do you live, Mrs. Thomas?
A. 405 Nevada Street, Gridley.
Q. Where is that with relation to the Atchley residence?
A. It is north and on the west side of the street.
Q. Across the street?
A. Yes.
Q. Across the street from the Atchley residence?
A. Yes.
Q. Did you meet Mrs. Atchley prior to her death?
A. No, I did not.

• • • • • • •

[fols. 696-697] Q. What happened at 12:30?
A. Well, I was waiting for my husband to come home and I seen a small two-tone Nash go down past our house.
Q. When had you seen that?
A. That was approximately 12:20. And my husband came in then at about 12:30.

• • • • • • •

Q. What was the next thing you noted, if anything?
A. Well, then, after we had watched television and gone to bed, about 20 after 1:00 we seen a man come down Nevada Street going south on Nevada, and he turned and went east on Magnolia.
Q. I see. And did you note anything about dress of this man?
A. He had on a light shirt and dark pants and no hat.
Q. Was his shirt in or out of his pants?
A. Out.
Q. Out of his pants?
A. Yes.

• • • • • • •

[fols. 698-705] Q. Did you see this Nash car again?

A. I seen the Nash after the man run up the street.

Q. Come back by in front of your house?

A. Came back and went south. It was going south on Nevada and turned and went east on Magnolia.

Q. Did you notice anything unusual about the car with relation to speed or any other——.

A. Well, he was going rather fast around the corner.

. . . . . .

[fol. 706] Doris M. Thomas, called as a witness by the People, having been previously duly sworn, testified as follows:

Direct Examination. (Resumed)

By Mr. Mulkey:

Q. Having in mind this is Magnolia, Mrs. Thomas, and Nevada here and Sycamore up here, and I believe this is your home right here.

A. Yes.

Q. And then the Scharsch home is right here?

A. Yes.

Q. And Mrs. Atchley's home is right here?

A. Yes.

Q. Now, having those points in mind would you take this pointer, Mrs. Thomas, and show us——. I think you said that in the evening about 12:30 you first saw this car go by?

A. Yes.

Q. Can you tell us where it——.

A. It came down this way.

Q. Came down this way?

A. Yes.

Q. It came south on Nevada?

A. That's right.

Q. Did you see where it turned off of Nevada?

A. No, I did not.

Q. It just went down south on Nevada out of your line of vision?

A. I didn't pay any more attention to it.

Q. Now, you next saw this man about 1:00?

A. About 1:20.

Q. And where was he when you first saw him?

A. He was coming down this street here and turned and come back over here into these shadows of the trees.

[fol. 707] Q. He came south on Nevada down to Magnolia and turned——.

A. East on Magnolia and came to the alley.

Q. Came to the alley?

A. Yes.

Q. Then disappeared from your view?

A. In the shadows of the trees.

The Court: Counsel, I am not sure whether it appears that the individual is walking or driving at that time.

The Witness: He was walking at the time.

Mr. Mulkey:

Q. The next time you saw him he was where?

A. Next time I saw him he was outside of the yard here.

Q. Outside of the Atchley yard here?

A. Yes, and coming up the street. And he walked until he got right up here walking fast, and then he run.

Q. He ran in front of your house?

A. My house.

Q. And out of your line of vision?

A. Yes.

Q. In a northerly direction on Nevada Street?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. And then you saw this car that you had seen at 12:30 again?

A. Yes, I did.

Q. Where did you first see that car again about 12:30?

A. Well, it was approximately right along in here when I saw it because he come down past my house and around this corner here and disappeared.

Q. East on Magnolia?

A. Yes.

. . . . . .

[fol. 708] Cross-examination.

. . . . . .

[fol. 709] Q. Now, you say there was some period of time elapsed between the first time that you saw a man go down Nevada Street and around here onto Magnolia, is that right?

A. That's true.

Q. What time was it that you saw the man come down walking down here and around Magnolia?

A. Approximately 1:20.

Q. 1:20?

A. Yes, sir.

Q. And then it was about 2:30 you say that you saw the same individual?

A. That is true.

Q. You are sure it is the same man, are you?

A. Yes, I am sure it is the same man.

. . . . . .

[fol. 710] Q. You say that you again saw——. At what time approximately did you again see the defendant or whoever you might have seen?

A. I would say it was between 25 after 2:00 and 2:30.

Q. At that time you saw somebody come out from this region in here?

A. Yes.

Q. And you looked across from your house over this way, is that it?

A. That's right.

Q. And that was about 25 minutes past 2:00, did you say?

A. That's right.

Q. Now, when you saw this man coming down here as you have testified and turning east on Magnolia, that was earlier in the evening and he was walking?

A. That's right.

Q. Now, the second time you saw him what was he doing?

A. He walked almost to the intersection walking fast and then he run.

Q. You mean that was the second time you saw him. Did I understand you to say you saw an automobile go down that way?

A. Yes. About 20 after 12:00.

Q. 20 after 12:00? And where was that automobile going?

A. It went south on Nevada Street.

Q. Did it keep going?

A. I didn't pay any attention after it got down towards the corner on Laurel Street.

Q. Did you see any other cars go down the street that night?

[fol. 711] A. Yes, I did.

Q. How many?

A. Oh, there was three or four. One of them was a pink Cadillac going east on Magnolia Street.

Q. Did you see a dark, ancient, either a '42 or '45 or maybe '49, maybe '50, go around that block that night?

A. I did.

Q. What color was that car?

A. It was black.

Q. A dark black car, was it?

A. Yes.

Q. Did you recognize the person in it?

A. No, I didn't.

Q. The fact of the matter was it was nighttime, was it not?

A. It certainly was.

Q. And at 3:00 o'clock in the morning?

A. Yes.

Q. And these streets are shaded here?

A. There is always a street light on the corner.

Q. Now, in the center of this street——.

A. It is over to the side of the street.

Q. Over here?

A. Right there.

Q. On this corner?

A. Yes.

Q. Now, this car that you have talked about last that went down the street, would you tell the jury please just what was the first time you saw that car?

A. The black car?

Q. Yes, the darker car.

A. It came down the street on Nevada Street going south, it turned and went west on Laurel Street and circled the block.

Q. Where would Laurel be?

A. Laurel is south, right straight south.

Q. Down in here somewhere?

A. That's right. It circled the block and came back [fol. 712] by my house on Magnolia Street, it turned and went south again.

. . . . . .

[fols. 713-714] Q. You may use the pointer.

The Court: Proceed.

The Witness: That car came down this way (indicating on diagram) and came down to Sycamore and turned and back up and it came this way (indicating) and came over and shined its lights over towards this house. It came down and made a turn and come up back this way (demonstrating on diagram).

Q. Obviously putting the lights in here (indicating)?

A. Yes, it kind of pulled over and shined the lights in the yard. It came back and the next thing I knew it was sitting in here (indicating). It came down back around this way and was sitting here for about a minute, that was after the shooting.

Q. Now was that car traveling very fast?

A. No.

Q. Now the reason you particularly noticed that car was because it was going rather slowly?

A. Yes.

Q. It was obviously going slowly, was it?

A. Yes.

Q. And when it came back the second round it shone the lights into the Atchley residence?

A. Yes, it did.

Q. It wasn't just going about its business but he was evidently interested in there to see something?

A. I guess he was interested.

Q. And that wasn't this car that has been identified here?

A. No.

Q. It wasn't the same car at all?
A. No.

. . . . . .

[fol. 715] Redirect examination.

By Mr. Grinnell:

Q. Mrs. Thomas, do I understand your testimony to be that the car that you saw drive by around 12:30 or 12:20 and continued on up the street is the same car that you saw leave the scene after the shooting and drive down Nevada Street, turn the corner and drive rapidly away?
A. That is right.
Q. And is that the car that you identify as a car of this general description?
A. It was of that description.
Q. And could you tell us the color of that car?
A. No, I do know it was a two tone, but I do not know the exact color.
Q. And did you get enough of a look to know what the make of the car was?
A. It was a small Nash.
Q. Now you heard the shots, did you not?
A. Yes.
Q. And were they close together or were they spaced?
A. They were close together.
Q. They were close together and I believe you said that following the shots you saw a man leave the front of the Atchley residence?
A. He was out in front of the Atchley residence.
[fol. 716] Q. And you hadn't seen this man go into the yard, into the front yard?
A. I saw him earlier in the evening go down the alley.

. . . . . .

Mr. Grinnell:

Q. You saw a man you say, walk down Nevada Street in front of your house, turn the corner and go East on Magnolia about 1:40 in the morning, was that my understanding?
A. 1:20.

Q. 1:20, excuse me, and how far did he proceed East on Magnolia?

A. To the alleyway.

Q. To the alleyway and does that alley run north and south in back of the Atchley residence?

A. It does.

Q. It runs then in the same direction then as Nevada Street, both run north and south?

A. Yes.

Q. Now after the man went into the alley it was my understanding you didn't see him any more in the alley?

A. No, I did not.

[fol. 717] Q. Then my question was, he disappeared from your vision as he went into the alley, is that correct?

A. That is correct.

Q. And that is the same man that you saw, same general description of clothing and build that you saw leave the front of the residence after the shooting?

A. That is right.

Q. Now how soon after the shooting?

A. I would say about a minute.

Q. About a minute?

A. That is as close as I can come to it.

Q. At the time of the shooting you were apparently awake that night prior to the shooting?

A. The fire whistle woke me up about five minutes after 2.

Q. Did you see any other man, any other person other than the man that you have described walk up the alley around there that night, before the shooting?

A. No.

Q. Did you see any other person other than this car that you have told us about after the shooting?

A. No.

Q. Did you see Mr. Scharsch come out of his house?

A. I seen Mr. Scharsch stop the black car after the shooting.

Q. Then Mr. Scharsch stopped this car, it didn't stop on its own?

A. Mr. Scharsch had stopped the car.

Q. And then did the car come back around again after Mr. Scharsch stopped it?

A. No, it did not.

Q. Did the car drive away then or did it remain there?

A. Mr. Scharsch spoke to the man and then Mr. Scharsch [fol. 718] walked over to the Atchley house and when he started back the car left.

Q. The car drove away?

A. Yes.

Q. And you didn't see it again?

A. No, I didn't.

Q. So that it drove around in front of the house twice, was stopped on the second round by Mr. Scharsch, Mr. Scharsch engaged him in conversation and then he left and you didn't see it again?

A. That is right.

Q. Did you see any other man around there other than these people you have told us about?

A. No, I did not.

Q. No one else?

A. No one else.

Q. Go in or leave the area?

A. No.

. . . . . .

Recross-examination.

By Mr. King:

Q. You could have perhaps seen somebody drive in—this is just to acquaint you with this diagram (holding up diagram). This is the front of the Atchley residence in Gridley and this is an automobile into the car port, pointed inward to the car port. Now if somebody had driven in—did you see this car drive in there?

A. No, I didn't.

Q. Then you don't know when Mrs. Atchley came home, did you, if she drove home in that car?

A. I do know the car was not there at 5 minutes after 2 when the fire whistle blew.

Q. But it did come in there at some time or other?

A. It came in between the time the fire whistle blew and [fols. 719-758] the time she was shot.

Q. And after the shooting did you see this car?

A. Yes, I did, it was still in the driveway after she was shot.

Q. It was still in the driveway the next morning, wa- it not?

A. That is right.

. . . . . .

[fol. 759] Mr. HERBERT E. LAZERE, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

The Clerk: Will you state you full name please.

The Witness: Herbert E. Lazere.

Direct examination.

By Mr. Mulkey:

Q. You live where, Mr. Lazere?

A. I live in Sacramento.

Q. And by whom are you employed?

A. I am employed by the State Department of Justice.

Q. I see. And were you summoned to this area on or [fol. 760] about the 2nd day of August of this year?

A. I came to Oroville on the 3rd of August.

Q. On the 3rd of August?

A. Yes.

Q. And about what time did you come up here on the 3rd?

A. I arrived in Oroville approximately at 10:00 o'clock, 10:00 p.m. that is on the evening of the 3rd of August.

Q. And did you have occasion after arriving here to talk with the defendant Atchley?

A. Yes, sir, I did.

. . . . . .

Mr. Mulkey:

Q. Do you recall when it was you first talked to the defendant Atchley, Mr. Lazere?

A. It was at approximately 11:30 p.m. on the same night, August 3rd.

Q. On the night of August 3rd?

A. Yes, sir.

Q. And where did you see Mr. Atchley?

A. I first talked to Mr. Atchley in the District Attorney's office here in the Butte County courthouse.

Q. And who was present at the time you talked with him?

A. I talked to him alone.

Q. I see.

A. The first conversation I had with him was just be-
[fol. 761] tween him and I.

Q. Between you and him in the District Attorney's office here in the courthouse, is that right?

A. Yes, sir.

Q. Now, can you tell us what the conversation was with Mr.—or pardon me—before you spoke to him did you make any promise to him of immunity to him to get him to talk with you, or any threats to him to get him to talk with you?

A. No, sir, none whatsoever.

Q. Then will you tell us the conversation you had with him at that time?

. . . . . .

[fol. 762] Mr. Mulkey:

Q. Now, would you state the conversation you had with Mr. Atchley, sir?

A. I introduced myself to Mr. Achley, told him I represented the State Department of Justice and come from Sacramento at the request of the District Attorney Mr. Lyde. I told him I had been requested to assist in the investigation of the murder of Mrs. Atchley, his wife, asked him to explain if he would any knowledge that he had of the crime or any circumstances that might have taken him over to Gridley on the night of the murder. I asked him in fact to briefly outline exactly what his activities consisted of during the course of the previous evening.

Q. That would be the evening of the 2nd and morning of the 3rd?

A. That is correct. Mr. Atchley told me he had visited two or three taverns in the Palermo area, namely the Dog House, the Shamrock Cafe and he had consumed a couple of beers, he stated, in each of these premises, that he after leaving the Shamrock had returned to his home at approximately 12:00 o'clock midnight where he retired, went to bed

and was next awakened by the officers sometime on the early morning of August 3rd and taken into custody. I asked him if he had gone over to Gridley during the previous evening or night at any time and he replied that he had not, that he had not left the Oroville-Palermo area. I asked [fol. 763] him if he at any time owned, or at the present time particularly, owned a .22 caliber automatic weapon. He stated that he did not now own nor at that time did not own a .22 caliber automatic weapon. I asked him if he had previously owned a .22 caliber automatic weapon and he told me he had, it being a .22 caliber automatic pistol which he described as a Luger. I asked him what happened or what he had done with the weapon. He told me he had sold to his wife Mrs. Atchley. He placed the date of the sale at approximately a month ago.

Q. A month from the date you talked with him?

A. Yes, a month from the date of the conversation we were having.

Q. Proceed.

A. So he stated just previous to the time he had sold the gun to his wife—or I will take that, retract that statement and say just after he had sold his wife the weapon there was an altercation out at his house wherein his wife had threatened her brother-in-law who he named as Wesley. He wasn't aware of the last name but he said the name of the brother-in-law was Wesley and that Mrs. Atchley had threatened Wesley with the .22 automatic weapon.

Q. Which he had heretofore sold to her?

A. Yes. After it came into her possession she threatened her brother-in-law Wesley with the weapon. Shortly after that threat when the weapon was used against the brother-in-law he had advised her to get rid of the weapon or dispose of it which he stated she had done. I asked him to whom she had given or sold the weapon and he stated that the weapon approximately—it was either the last week or [fol. 764] a week before, he was unable to fix the date or time of the sale but he stated that the weapon had been sold to a fellow named Brown and I asked him where the sale was consummated and he stated in front of the trading post or secondhand store which was located across from where they are building the new Safeway.

Q. In Oroville?

A. That is correct, here in Oroville. I asked him to describe the transaction between Mrs. Atchley and Brown and he stated he had previously offered the gun for sale at the secondhand store or trading post and that after that she had disposed of it immediately in front of this establishment, the secondhand store, that is to a person named Brown. He further described the circumstances of the sale by saying that she had written a bill of sale which indicated that the price received for the purchase of the gun from Mr. Brown was $30.

Q. Had he indicated to you what he sold the gun to his wife for?

A. He stated she paid him twenty-five bucks for the gun.

Q. And she sold it to this Brown for $30?

A. That is correct. I asked him to describe Mr. Brown, which he did. He said he was from 42 to 45 years of age, that he weighed approximately 140 to 145 pounds, that the hair, which he could see on Mr. Brown was a graying nature, that Brown wore a hat, he was otherwise attired in a pair of khaki trousers and a dress shirt. I asked him again [fol. 765] when this transaction took place between Mrs. Atchley and Brown and he said it was either last week or the week before, he was again unable to fix the date. I asked him if for any reason the gun had found its way back to either he or his wife and he assured me it had not, that was the last time he stated that he had seen the gun.

Q. Did you ask him who he thought was responsible for his wife's death?

A. Yes, I asked him who he actually thought murdered Mrs. Atchley and he named a fellow by the name of Bud Jones. I asked him to further identify Jones and he further gave the name of Braxton Jones. Additionally he stated Mr. Jones lived, and I have an address somewhere in my notes, Jones lived, according to Mr. Atchley, back of the Sandwich Wagon on A Street, and I would assume that is here in the Oroville area. I asked him whatever gave him the impression or idea that Mr. Jones had murdered Mrs. Atchley and he stated that he had been informed that Jones had been in the Feather River Inn and had made a statement in the presence of Mrs. Waters wherein he had threatened to kill not only Mrs. Atchley but Atchley himself.

Q. Anything further in that conversation at that time between you and him?

A. Yes, sir. I asked him if for any reason he had ever threatened Mrs. Atchley and he stated that he had. I asked him if he had threatened her life or threatened to kill her and he again stated he had. I asked him when was the most recent occasion that he had threatened Mrs. Atchley [fol. 766] and he told me it was probably two weeks ago. I asked him why he had at that time made a threat of this kind and he said Barbara Ferris, Mrs. Atchley's daughter, had informed him that his wife Mrs. Atchley had been chasing around with other men. I said, "Well, could you describe any incident wherein she could have been out with any other men." At that time he told me she had been out with Barbara Snow, that is, he had been informed by Barbara Ferris that Mrs. Atchley had been out with Norma Snow, a fellow he knew as Bill and another man, he was unable to further identify the other man who was supposedly chasing around with his wife.

Q. Did he tell you the exact words he may have used in the threats on her life?

A. Yes. I asked him what were his exact words and he stated, "I ought to kill you, you son-of-a-bitch, you ought to die." Those were the words he used. Additionally I asked him how he felt about his wife, what was the present status or condition of their marriage prior to her death. He told me at one point in the conversation that she was the type of woman he couldn't live with and couldn't live without her. He stated in fact he didn't want to live without her. I asked him if he was in fact married to Mrs. Atchley and he stated that he was and that they were married in Georgia on December 6, 1957. I asked Mr. Atchley at one point in the conversation if it wasn't a fact that Mr. Scharsch had actually looked out the window of the place adjoining Mrs. Atchley's residence and see [fol. 767] him fire several shots from the pistol. I asked him if Mr. Scharsch hadn't called out to him to the effect of, "Hey, what is going on over there". Atchley replied, "He was the one that was supposed to have said something to me, I never heard", I think, realizing that he was placing himself at the scene of the murder. Atchley stated, "I wasn't even there."

Q. Is that about the substance of the conversation you had on that occasion?

A. I am checking my notes to see if there was anything else. Atchley stated he had obtained the .22 caliber Strum Luger automatic from a person he identified only as the initials G. W. I questioned him as to the identify of this individual and he said it was a boy he had met while working out at Honcut during the summer of 1957 which would be the previous summer.

Q. Did you ask him what he had been wearing the evening that this killing occurred?

A. Yes, sir, I did, and he informed me that he had been wearing the same clothes that he was wearing when he was arrested or taken into custody the following morning. Throughout the conversation Mr. Atchley had extreme difficulty in actually placing times. I would ask him what time he was at the Dog House and he thought it was 10:00 or 10:30. I asked him what time he was at the Shamrock and he thought it was as late as midnight. However, he wasn't certain of that. He stated he was accompanied while he was at the Shamrock Cafe by a fellow named Clint Roulette and another boy whose name he was unable to [fol. 768] remember, that he had taken Clint Roulette and this other boy out to Clint's sister's home after which he returned to his home and retired for the night.

Q. Did he mention something about having some tire trouble?

A. Yes, he did. He stated that after drinking what he described as a couple of beers, which was at the Shamrock, it was decided that they would leave, that would be Atchley, Clint Routiette and the other boy whose name he was unable to recall, and upon getting out to the street where he had his Nash Rambler parked he discovered he had a flat tire. He stated Clint Roulette assisted him in changing the tire and that the tire was thrown into the back of the Rambler, replaced by the spare, after which they all piled into the Nash Rambler and proceeded on.

Q. After you had this conversation with him you then took part in a conversation between him, Sheriff Gillick and Mr. Lyde, did you not?

A. Yes, sir. And in addition to the people you have

named there was also present Lyle Ishmael, deputy sheriff of Butte County.

Q. And this conversation as I understand it purports generally with what he told you previously, immediately previous to the conference with Mr. Lyde?

A. Practically the same information was covered, yes, sir. I at the time had my notes and was taking part in the second conversation. We referred generally to the same type of information.

Q. When did you next have a conversation with Mr. Atchley?

[fol. 769] A. I again interviewed Mr. Atchley at the Butte County jail, that is in the investigator's room upstairs in the Butte County jail at approximately 12:00 noon on the following day, that would be the same day, pardon me, that would still be the 3rd. No, that would be the 4th of August. I am sorry.

Q. Who was present on that interview?

A. Present at that interview were the defendant Atchley, Sheriff Larry Gillick, Chief of Police Gibbs from Gridley and myself.

Q. And had anything of importance occurred between the previous conversation with Mr. Atchley and the time you interviewed him in the investigator's room as you state?

A. Yes.

* * * * * * *

[fol. 770] Mr. Mulkey:

Q. Upon entering the—let me again ask with reference to this conversation, did you or did the other members present there make any promises or threats to Mr. Atchley on that occasion?

A. No, sir, none whatever.

Q. What was the first thing that occurred as you were in the investigating room to see Mr. Atchley, the first thing that was said or done?

Mr. King: The first thing he said?

Mr. Mulkey:

Q. The first thing that was said or done.

Mr. King: If the Court please I am going to object to the introduction of a statement of the—I mean, conversation with the defendant at this time under the place and circumstances which have been brought out here, that there is no proper foundation laid to show any self-incriminating conversation on the part of the defendant, that it does violate the privilege of self-incrimination and the fifth amendment of the United States Constitution, that there is nothing to indicate that the statement was given [fol. 771] freely and voluntarily on the part of the defendant.

Mr. Mulkey: I will submit that objection. I don't believe it deserves argument.

The Court: You may examine on the point as to whether any statement made or discussed was free and voluntary if you wish, Mr. King, your objection is overruled on the other grounds.

Mr. Herbert E. Lazere, a witness previously duly sworn, is examined further on voir dire examination:

Cross-examination:

By Mr. King:

Yes. (Questioning witness) May I ask you, Mr. Lazere, just what time you went up to the sheriff's office with this group of officers to examine the defendant in the interrogation room as you have testified?

A. To the best of my recollection I testified that it was approximately 12:00 noon.

Q. On what day?

A. This would have been August 4th, Monday.

Q. Now do you know whether or not the defendant, how the defendant was dressed at that time? He was without shoes, was he not?

A. To the best of my recollection he was without shoes, he was otherwise fully clothed.

Q. Did he have trousers?

A. Yes, he did.

Q. And did he have a shirt?

A. Yes, sir.

[fol. 772] Q. Do you know whether or not the defendant had had any sleep the night before?

Mr. Grinnell: Just a moment, Your Honor. He was permitted to ask him whether or not the statement was given free and voluntary and now he is going into whether or not he had any sleep the night before.

Mr. King: Just a moment, if the Court please. It is very important as to whether or not the defendant was composed at the time and my question is and my question will go to the fact the defendant had been kept awake for a great many hours and that he was groggy for want of sleep when he was questioned by this witness and I feel I have a proper right to go into the facts here just how the defendant appeared and whether or not this witness knew that the defendant had been kept up for many hours prior to the time that he questioned him.

The Court: I think this witness can testify as to the appearance of Mr. Atchley at that time.

Mr. King:

Q. Did you know that the defendant had no sleep the night before?

A. No, sir, I didn't know that. He told me he had slept through his morning meal so that I assumed that he had slept.

Q. But that was only briefly?

A. Well, I assumed that after 5:00 o'clock when the first interview was conducted until noon when the second interview had started he had slept, at least he told me he had slept.

. . . . . .

[fol. 773] Mr. King: Very well. (Questioning witness) How did the defendant appear at that time to you?

A. He appeared to be normal in every respect.

Q. He wasn't nervous?

A. I wouldn't say he appeared to be nervous.

Q. Had you told him he was charged with a crime?

A. Yes, sir. I told him the previous evening that he was booked for investigation of the crime of murder.

[fol. 774] Q. That is, before you first started to talk to him?

A. That is correct, sir. I was led to believe by Sheriff Gillick at a preliminary conference that Mr. Atchley had been arrested and was then in custody.

* * * * * * *

[fol. 775] Mr. Herbert G. Lazier, a witness previously duly sworn on behalf of the People, resumes direct examination.

Direct examination.

By Mr. Mulkey:

Q. My last question to you, Mr. Lazier, was could you tell the Court what was the first thing that was said or done as you entered the room over in the jail around noon on the 4th to talk to Mr. Atchley?

A. Sheriff Gillick and myself and Chief Gibbs entered the room at which time I was carrying the 22 caliber Strum Luger in one plastic bag and the holster in another plastic bag. Mr. Atchely immediately recognized the weapon and the holster and his first statement to me was, "I heard you had located the gun", I asked him where we located the gun and without any hesitation he told me that he had buried it in the back yard of his residence. I asked him if he knew where we had recovered the holster and he was very hesitant for some little time to discuss the matter of the holster or where we might have recovered it and finally he stated he had placed the holster in a trash barrel in back of his residence.

Q. Did he give you some other explanation?

A. Yes, his first explanation for the holster being in the trash barrel in back of his residence was the fact that the holster had been thrown into a garbage pail in his home and later carried out to the trash burner by a youngster from the neighborhood or next door, apparently a little blond headed youngster he described her as, that she had

[fol. 776] taken the garbage pail from his home and dumped it into the rubbish barrel out in the back yard and that is unquestionably how it could have gotten out to the back yard. He later, however, acknowledged before he had driven over to Gridley on the night of Mrs. Atchley's death that he himself had placed the holster in the trash barrel, in fact he had hid it approximately six inches beneath the surface in some cans and ashes that were then contained in the trash barrel.

Q. Did he during this interrogation indicate that he had shot his wife?

A. Yes, sir, he did. I asked him if the statement which he had made previous to me was true and he stated that it was not, that it was a false statement and that he now wanted to tell me that he had driven over to Gridley on the night of his wife's death and after some little struggle she had been shot with the gun that I held at the present time during this interview.

Q. Did he tell you who brought the gun to the scene on that occasion?

A. Yes, sir, he did.

Q. Who was that?

A. He stated after he arrived over at Gridley, he had driven over in his Nash Rambler, had parked his car approximately one and a half blocks from his wife's residence, he had entered the premises by way of the alley, down into the back yard where he spent some little time in a shed. I asked him to describe the shed and he stated it was a storage facility or something in the back yard. I asked him if he smoked a cigerette or two while he was [fol. 777] in the back shed and he told me that he had smoked one. I asked him if he had had a bowel movement while he was in the shed and he acknowledged the fact that he had on the floor of the shed while he was waiting there. I asked him why he had spent this considerable period of time in the back yard or in the shed. He stated that his wife had not yet then returned. He had gone to the front of the property, her car was not there and he assumed that she was not there and he was waiting for her to come in and that he presumed that when she came in she would be with another man. I asked him why he didn't park his car at the front of his wife's house and

he stated that if he parked his Rambler in front of her house when she arrived or if she arrived with another man of course they wouldn't stop, they would keep right on going. I asked him what next happened and he stated he heard his wife's car come into the car port, he went around the corner of the house and proceeded towards his wife. He stated that at that time she was coming through the gate, the front gate and he observed in her hand the 22 caliber automatic revolver. I asked him if she had had the gun previously and he said, "Yes, she had it in the car" and she got out and held the gun in her hand. As he approached Mr. Atchley stated she pointed the gun at him, there was a struggle and the gun went off, what he described as several times, possibly two or three. He stated he wrestled the gun from her grasp after which the gun went off a couple of additional times. I asked him if by then Mrs. Atchley was laying on the ground and he [fol. 778] said she was. He stated, in fact, that the gun had gone off a couple of adidtional times after she had fallen to the ground. I asked him if he realized she was dead at that time and he said he wasn't certain of whether she was or whether she was not. He stated he then took the gun, placed it in his car, drove back to Palermo, where he buried the gun in the back yard behind his cabin. Previous to the time we entered into the discussion of the gun I asked him what caused him to make a trip to Gridley on the night of his wife's death and he stated while he was drinking, presumably in the Shamrock, he named the Shamrock as being one of the last taverns where he drank, he stated that while he was in the Shamrock he was advised by a unidentified bar patron that his wife was out at Robinson's Corners attending a dance and that she was in the company of another man. He stated with this he decided to go out to Robinson's Corners and actually ascertain for himself whether or not Mrs. Atchley was in attendance at the dance and if in fact, she was with another man. He got in his car and drove out to Robinson's Corners where he looked around checking for his wife and there did not find her. He then proceeded to Gridley and described the trip to Gridley and the return as I have testified.

Q. In this conversation with him did he later in the

statement indicate some new version of how this holster got in the ash can again after he had told you that he had put it in there before he went to Gridley, did he later tell you anything else about it?

A. Yes, later in the conversation he stated, in fact he [fol. 779] was asked the question and I don't believe I asked a question concerning the holster on this occasion but it was asked in my presence, he was asked whether or not he had actually placed the holster in the trash barrel before or after his trip to Gridley and he then related he had placed the holster into the trash barrel after he returned home.

Q. When he buried the gun?

A. That is right and I asked him when he buried the gun and he said, "Immediately after I returned from Gridley to my home in Palermo".

Q. Did he tell you in this conversation or relate anything about some shorts?

A. Yes, sir, he did. He stated after he arrived home from the trip to Gridley that he had had a bowel movement within the home and lacking any toilet paper that he had wiped himself on a pair of shorts and thrown them out the window in back of the house. I asked him to describe the shorts and he said they were the conventional type boxer shorts of a striped material.

Q. Did he state he had some condition?

A. Yes, he stated he was troubled with piles hemorrhoids, an aggravated condition which caused him to suffer considerable bleeding, this was a constant problem Mr. Atchley stated and each time he had a bowel movement he would have considerable bleeding or hemorrhaging so that the blood in addition to—so that the shorts in addition to any other material present would probably have quite a large quantity of his blood.

Q. Now at one occasion here in this second statement he [fols. 780-788] admitted to you he had been in the shed and had a bowel movement, did he thereafter change that part of his statement?

A. Yes, he later stated he had been in the shed but that had not had a bowel movement.

Q. Now your particular occupation, Mr. Lacier, is interrogation, is it not?

A. Yes, I am a special agent.

Q. Just for that purpose?

A. Yes, sir.

Q. And it is your business to remember what you talked to men about?

A. Yes, sir.

Q. You say that he said that he was going over to Robinson's Corners to see if she actually was there, did he tell you he actually made that trip to determine whether his wife was there at the dance?

A. Yes, he did.

Q. And did he tell you what the result of that trip was?

A. He said when he arrived at Robinson's Corners he thought to the best of his recollection it was approximately 1 a.m. and that he made a pretty good search of the premises and failed to find Mrs. Atchley there at the dance.

Q. Did he tell you where he went right after that, did he go to Mrs. Atchley's house?

A. Yes, sir, he described his activities as going directly to Gridley to her home.

Q. And then returned later, on how many times did he tell you he went to her home?

A. He told me he had made only one trip to Gridley on the morning of August 3rd.

Q. In your statements with him did he ever [redacted] at assertion that he had only made the one trip?

A. No, he did not.

[fol. 789] Cross-examination.

Mr. King: Very well, Your Honor. (Questioning witness) May I inquire again please, from you who was present when the statements were made that you testified about last evening, did I understand you to say that at first you talked to the accused alone?

A. That is correct, sir.

Q. And then other people came into the room did they?

A. Yes, sir, they did.

Q. And what room was that?

A. That was Mr. Lyde's Office within the District Attorney's office, here in the Courthouse.

Q. Yes, and those persons included Chief Gibbs?

A. No, sir, not at that time, we now are referring to the second half of the first conversation that I had with Mr. Atchley I presume?

Q. Yes.

A. Present in the room at that time were District Attorney Lyde, Sheriff Gillick and Deputy Lyle Ishmael of the Sheriff's office, Mr. Atchley and myself.

Q. Did you hear Mr. Atchley say at any time during that conversation up to that time, that he had had no sleep during the night of Saturday night the 2nd and at any time did you hear him say that he had had no [fol. 790] sleep during the night of the 3rd, that would be Sunday night.

A. I fail to recall any statement of that kind made by Mr. Atchley.

Q. Did you notice that his shoes were removed at the time you talked to him?

A. The only time I recall his shoes having been removed was when I later talked to him in the Sheriff's department.

Q. He had his shoes on when you talked to him?

A. I would presume he did, I failed to take any particular note, but I feel that he did, I probably would have noticed that if they were removed. I did on a later occasion when he came in to us without his shoes, I immediately recognized that he had no shoes at that time.

* * * * * * *

Mr. King:

Q. When you noticed his shoes had been removed.

A. This was at the noon conversation I had with Mr. Atchley in the Sheriff's department. A man in his stocking feet is what called it to my attention, no more than the oddity of seeing a man in his stocking feet.

Q. Did you know his left foot had been amputated, and that his toes had been removed?

A. Somewhere I heard this, but I didn't examine the foot. He had on stockings and I didn't examine his foot.

Q. Now did you happen to notice whether or not he had [fol. 791] trousers on?

A. Yes, sir, and I don't know which conversation you

refer to but each time I talked to him I could definitely state he had on trousers.

Q. You weren't present then when all of the conversations were had?

A. To the best of my recollection I have had two conversations with Mr. Atchley, the first, which I stated was entirely between himself and I, the second half of that conversation the gentlemen I have just named and the third at the Sheriff's department, with Sheriff Gillick, Chief Gibbs, myself and Mr. Ishmael present. Those are the only three conversations that I actually know anything about because those are the only ones in which I partook.

. . . . . .

[fol. 792] Mr. David Q. Burd, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

. . . . . .

[fol. 793] Mr. Grinnell:

Q. Now your name is David Burd?

A. That is correct.

Q. B-u-r-d?

A. Yes.

Q. And by whom are you employed, Mr. Burd?

A. The laboratory of the California State Bureau of Criminal Identification and Investigation.

Q. And how long have you been employed there?

A. About 17 years.

Q. And what are your educational qualifications, where did you go to school?

A. I am a graduate of the University of California, where I majored in Technical Criminology. After graduating I did some additional work at the University although not as a registered student and for the past, about 17 years I have been employed by the State in my present position.

Q. Do you have any special training other than that you have acquired while you have been employed by the state?

A. Yes, my college training was primarily in connection with the field of criminology, the scientific examination of various types of materials involved in legal cases.

Q. And have you had special training in particular in ballistics?

A. In firearm identification work, yes, which is a phase of ballistics. That has included some college training and experience on the job, of reading most of the literature that has been published in the field, and some experimental work.

Q. And have you been called as an expert to testify in [fol. 794] this field before?

A. Yes, on numerous occasions.

Q. And about how many occasions have you testified as an expert in the Courts of this state?

A. Well, many hundreds of occasions, I don't know how many.

Q. In addition have you had training to examine garments to determine whether or not there is residue from firearms adjacent on the garments at all?

A. Yes, I have.

Q. And you have testified to those facts also, have you not in numerous trials?

A. Yes.

Q. Now I am going to show you these two objects, Mr. Mulkey has gone to get the bullets which I forgot to bring up—and ask you if you marked that—if you have ever seen that firearm before, first.

A. Yes, I have.

Q. And does it have your seal or your mark on it?

A. Yes.

Q. And where is that mark or seal?

A. I placed a mark on the left side of the gun just above the trigger and also I recorded the serial number on the pistol.

Q. And would you examine this garment and let me ask you if you have ever seen that before?

A. I have.

Q. Now as long as the shells are not here we will talk

about the dress first. Did you examine the dress, Mr. Burd, to determine whether or not there were any bullet holes in the garment?

A. I did.

Q. And were you able as a result of your examination to determine whether or not there were?

A. Yes, I was.

[fol. 795] Q. And how many bullet holes did you find in the dress?

A. There were several holes in the dress, I found five different holes that had the appearance of bullet entrance holes.

Q. Will you tell this jury, what if anything you found there, if you will, to indicate to you that they were made by a bullet.

A. On each of these holes, first there was a hole in the garment. In addition there was a small deposit of nitrate containing debris residue immediately around the hole which we normally find in bulletin entrance holes that is produced by the fabric wiping off traces of gunpowder residue from the bullet as it passes through the hole and in addition to that there were a number of particles of partially burned and unburned powder grains, gunpowder grains scattered around the hole in various areas around the outside on the fabric in the areas of the holes which we had examined; that was present in each case.

Q. Would you stand up please and point out those holes to the jury that you found to be made by bullets?

A. The first one is on the upper left front side which I am pointing to. There was another on the back right side where I am pointing and there is another hole up here which is not a bullet hole.

Q. It is just a hole?

A. Just a hole in the fabric. This hole near the center in the upper right side in the back contained gunpowder residue immediately around the hole and scattered particles of partially burned and unburned gunpowder grains embedded in the fabrics. In the general area I am pointing, to another hole at the right of that had no trace of [fol. 796] gunpowder residue and appeared to be either a tear or worn spot in the fabric. I don't know what caused the hole.

Q. But it is not in your opinion a bullet hole, you are certain of that?

A. I do not believe it would be a bullet hole, it certainly was not an entrance hole in any case. There are three other holes just below the right sleeve on the right side of the back, there are three of them fairly close together in a "T" shape, not a "T", but similar to it, two holes above and one below. Each of those holes had gunpowder residue immediately around the hole and a number of particles of partially burned and unburned gunpowder grains embedded in the fabric.

Q. So that then you found five entrance points in this dress at which a bullet entered the fabric of this dress? And you have just told the jury you found one in the front, one in the back, and three under the right arm pit or to the back, is that correct?

A. That is correct, yes.

Q. And each one of those in your opinion are entrance, points of entrance of a bullet?

A. That is correct, they had all the appearance of being bullet entrance holes.

Q. Now did you examine those (handing bullets to witness)?

A. Yes, I did.

Q. And did you put a mark on them?

A. Yes.

Q. And where is your mark?

A. I put my mark, well, they are on different areas on different bullets, either on the nose or base of the bullet.

Q. Would you point out to the jury where you marked [fol. 797] each one of those and hand it back to me?

A. There is my initial near the nose of the bullet (indicating). There is also another mark on the base of the bullet which I did not place on there, but which I recognize.

Q. Was it made by your associate?

A. There is a case number which he placed on them but I did not do it myself.

Q. But your mark is on there?

A. That is correct.

Q. And on the other one?

A. On this bullet my mark is also on the nose portion of the bullet where it has been crushed and damaged and

on the smaller partic*al* there is a mark on the, well, the side of the particle of lead.

Q. And you recognize your mark on each one?

A. Yes.

Q. Now were you able to make any sort of an examination or comparison of this smaller of the three, the one which I hold in my hand at this time (indicating)?

A. I examined it, yes.

Mr. Grinnel:

Q. You did make tests, did you not, with this gun, fired [fol. 798] test bullets?

A. Yes.

Q. With this gun?

A. Yes.

Q. And would you examine these and tell me whether or not those are the ones that you——

A. (Int.) These are the test shells that were fired by an associate of mine in our laboratory. I did examine the shells. I didn't follow through on it from the time he fired them until the comparison was made at all times, the examination was being conducted by Mr. Gilmore in my laboratory and I was present most of the time the examinations were made, however, I later fired a test of my own in the pistol.

Q. That is not one of these?

A. This is not.

Q. Very well, we will skip over that for just a moment. You did fire test bullets from this gun which you have previously identified that you examined?

A. I personally fired one, yes.

Q. And then did you compare the one that you fired with the three that you have previously identified that you marked and examined?

A. I did.

Q. Were you able to make a comparison with the test bullet that you fired with this smaller of the three which I have in my right hand?

A. Not a complete comparison. It was a bullet of 22 caliber, but it was very badly damaged and contained no characteristic rifling marks by which it could be identified as having come from a specific weapon.

Q. . . you were unable to connect it definitely with this gun, is that right?

[fol. 799] A. It could have been fired from that gun but I can not state whether or not it was.

Q. However, these two I have in my hand now you have previously identified, did you make a comparison of these two with the test bullet that you fired from this gun?

A. I did.

Q. And would you tell us at this time the result of that examination?

A. I found first that these two bullets had the same class characteristics, that is number of lans and gro-ves in the rifling marks upon them as did the test which I fired in the pistol. I then compared the bullets carefully under the microsope and found the fine detail present in these rifling impressions produced by the barrel of the pistol upon the bullet fired therein to correspond with the test which I fired. The similarities were very good and in my opinion did conclusively establish that these two bullets were fired in the automatic pistol submitted to me.

Q. I see, now generally speaking, Mr. Burd, it is true, is it not, that the lans and gro-ves of each gun have a distinctive characteristic just as fingerprints of each individual have distinctive characteristics, is that right?

A. That is correct.

Q. So that whether you were examining for fingerprints, or on the side of these bullets for certain marks, you would find distinctive characteristics depending upon which gun it was fired from, is that not correct?

A. That is correct, you can not always determine it was fired from a particular weapon, it depends on whether or not [fols. 800-803] the markings are characteristic. Occasionally we find a weapon that leaves very indistinct markings and we can't identify bullets as having been fired in those weapons; but very commonly we find a sufficient correspondence upon which to base a conclusive opinion, and in this case the markings were very distinct, although there were some areas that were damaged on each of the bullets, I couldn't compare every single marking that was present on the test bullet with every marking present on the question bullet. The two that you have in your hand,

but there was sufficient similarity in many areas to justify my opinion, the opinion which I have given.

Q. That it was fired by this gun?

A. That is correct.

. . . . . .

[fol. 804] Q. I am going to hand you a container and ask you if you recognize that container?

A. I do.

Q. Are your initials on it?

A. Yes.

Q. Did you seal the container up?

A. I did.

Q. Where did you seal it up?

A. In my office in Sacramento.

Q. Would you please open it now? What does it contain?

A. It contains a bullet and cartridge case which I fired in the Ruger pistol.

Q. By the way, this is a .22 automatic Ruger, not "Luger", it is Ruger pistol?

A. That's right, R-u-g-e-r.

Q. And this shell that you have, the cartridge and the shell, were fired from this gun?

A. That is correct. I fired them in that gun.

Q. Did you compare the pellet—we will call it the pellet—the bullet with the two that have already been introduced for purposes of identification?

A. I did.

Q. And the one that you have in your hand is the one that you testified corresponds to the two that have been offered in evidence for purposes of identification?

A. Yes.

[fols. 805-806] In addition to that there is a—what do you call this? Is it a shell casing?

A. That's cartridge casing.

Q. This is the one that you fired yourself?

A. Yes.

Q. Would you examine those please? Have you examined each one of them, Mr. Berg?

A. I have.

Q. Do you recognize those casings that you previously examined in your laboratory?

A. I do.

Q. Did you examine those in connection with this one that you handed me a moment ago which you yourself fired as a test bullet through the gun?

A. I did.

Q. Did you find any similarity between the casings?

A. Yes. I found the firing pin marking on the five cartridge cases and this exhibit corresponds with the test which I fired in the pistol. Also the chamber markings that are present on the sides of the cases.

Q. Now, is this little firing pin marking—is that this little mark on the side of the casing?

A. Yes, on the side of the head.

Q. On the side of the head? And you found that to correspond or be identical with the ones which you have in your hand?

A. Yes.

Q. Is that correct?

* * * * * * *

[fol. 807] Mr. Grinnell:

Q. Now, in addition to that were you asked to identify or to examine the contents of this can and this garment which I have in my hand here?

A. Yes, I was.

Q. What did you find in this can?

A. I found it to contain some paper inside of which was material that appeared to be feces.

Q. Human feces?

A. Yes. Well, I can't say——. They had the appearance of being feces.

Q. Did you examine this garment?

A. Yes.

Q. What did it appear to be?

[fols. 808-809] A. It appeared to be a pair of shorts that were quite badly stained.

Q. Did you examine these two items together at the same time?

A. Yes.

Q. Did you find anything in common between those two items, Mr. Burd?

A. I found the feces and the stains, feces stains on the shorts, both to contain blood.

Q. Did you find any blood in the sample that was in the can?

A. Yes, I did.

Q. And you found that same condition on the shorts?

A. Yes.

[fol. 810] Cross-examination.

Mr. King:

Q. Now, did you examine the body of the decedent?

A. No, I didn't.

Q. At any time?

A. No.

Q. You only examined the garment?

A. That is correct.

Q. You have testified that you found five holes in the garment?

A. That is correct. Five holes that appeared to be bullet holes. There were more holes.

Q. You did identify one that may have been caused by a snag or a tear or something of that sort?

A. Yes.

Q. And you said that all of those holes had powder burns around them, powder marks?

A. They had deposits of unburned—partially burned gunpowder residue, and also immediately around the is a little ring of smoke and other gunpowder residue.

Q. Now, of course, from your experience you can tell the difference between black power and smokeless powder?

A. Yes.

Q. And from your experience this was smokless powder?

A. Yes.

Q. Could you identify the kind of shell that it was fired in?

A. You mean the manufacturer of the shell?

Q. Yes.

A. Yes. It was marked on the shells. I don't recall at the moment. I would have to look at them again.

Q. I saw a box of Super-X's being waved around here.

A. As I recall they were Super-X's, yes.

Q. Now, the Super-X, does that case a long rifle?

[fol. 811-815] A. That was a long rifle.

Q. In other words, that is a very powerful .22 bullet or cartridge, isn't it?

A. For a standard cartridge it is one of the more powerful ones, yes.

. . . . . .

[fol. 816] Q. But you did examine the dress to find out about powder burns?

A. Yes.

Q. My understanding was that you said there were some power burns on the dress?

[fol. 817] A. There was a depositing immediately around the fabric on the outside of the dress such as always occurs, practically always occurs in anything but a loosely knit garment. It is produced by the bullet penetrating through the fabric and just being wiped by the fabric, or the edge of the bullet is wiped off and you see a little ring immediately around the outside of the fabric, outside the surface the bullet penetrated. That was present in each of these five holes. But in addition to that there were deposits over about a two inch diameter around the holes. It varied somewhat, but it was approximately two inches, sometimes a little bit more than that, of unburned and partially burned gunpowder grains, individual particles that did not completely burn up.

. . . . . .

Q. Under the right arm. Now, those holes in the dress were very close together, were they not?

A. Yes, fairly close.

Q. And there was powder all over that general region where the three or four holes were grouped together?

A. Yes. There was more concentrated right around [fol. 818] each hole, but there was some over the hole area.

Q. And the hole that you identified in the back of the dress had powder burns on it too?

A. Yes. I don't think we should use the word "burns". These weren't burns of the fabric. The fabric wasn't burned. It was unburned *power* residue and smoke deposited immediately around the hole. I think "smoke" would be a better term to describe this deposit around the hole than gunpowder burns.

[fol. 819] Q. How many holes did you say she had under her right arm of the dress?

A. There were three under the arm.

Q. One in the back?

A. One in the back and one in the front.

Q. One in the front?

A. Yes.

Q. On the right side? I am not trying to confuse you.

A. It is on the left side. It would be on the left side, yes, in the front—or at least I assume the dress was worn in the normal manner.

Q. The zipper in the back?

A. The zipper in the back.

[fol. 820] Q. Now, the diameter of the circle of powder around the entrance was approximately the same in each instance?

A. That is correct.

Q. And that would indicate that the gun was fired from the same distance or approximately the same?

A. Now; do you mean that little ring around the hole, or the gunpowder deposits?

Q. The ring around the hole.

A. The ring around the hole would make no difference where the gun was fired, a distance of one inch or half a mile as far as the ring immediately around the hole. The deposits of unburned powder grains, of course, would not carry any great distance from the muzzle of the gun. Normally the maximum distance you find is about, oh, —it varies from three to sometimes as much as five feet. But rarely that much.

Q. It would have to be within three feet? Between three feet——.

A. In this particular case in comparison with tests which I made I would say that the deposits around the hole indicated that the muzzle of the weapon was held between —certainly not greater than four feet or less than two feet. Probably closer to two feet.

Q. That is your considered opinion?

A. I mean one and a half feet there was much greater deposits and more smoke deposits on the garment or on a fabric over quite a wide area around the hole. Over four [fol. 821] feet there were very few if any deposits. So I would say between two and four feet, and probably closer to two feet—that is, between two and three feet. But I can't state the exact distance. There wasn't enough deposits and it wasn't clear enough, the distribution, to determine exactly what will happen. And on different shots we sometimes have some variation. Not every shot, even with different bullets, of the same manufacture, same type of ammunition, same powder charge, will deposit exactly the same.

. . . . . .

[fols. 822-824] Q. There is some variation?

A. Yes.

[fols. 825-832] Q. Like all tests of that sort they are not infallible? You could make a mistake, couldn't you?

A. That is correct. That is why, as I say, I will not state that the gun was held a distance of two feet or two feet six inches. I say it is somewhat between two and four feet. I have given a minimum and a maximum distance. I feel, however, it is more apt to be in the lower range than in the higher range.

Q. In other words, the gun was closer to the cloth than four feet away?

A. Definitely closer. But I can't say it was closer than two feet.

. . . . . .

[fol. 833] Redirect.

Mr. Grinnell:

Q. And you could definitely say that the gun was not 18 inches away when it was fired?

A. It was greater than 18 inches, but how much greater, I don't know, except it was *no* over 4 feet, would be the maximum distance it could be.

Q. And in your best opinion it would have been somewhere between two feet and four feet?

A. Well, I would say my best opinion it would have been between two feet and three feet, but I can't, because some of the holes are fairly close, particularly under the arm and I can't say that one or more of them couldn't have been as far as the maximum distance of four feet.

Q. Now this residue that is left as the bullet passes through the garment, does that residue contain nitrate?

A. They usually do, you are thinking of the hole or marking immediately around the hole.

Q. Yes.

A. That is produced from different things, particularly this wiping of lead from the bullet and also the gunpowder residue that are present on the bullet. In this particular case I tested a section of the few fibers, removed some around each bullet hole for nitrate and found nitrates to be present.

Q. Would you find any nitrates present, Mr. Burd, around the hole if it were an exit hole?

A. No.

Q. Only if it were an entrance hole would you find nitrate present?

A. That is correct.

[fol. 834] Q. You examined each one of these bullet holes testified to and found traces of nitrate at each one?

A. Yes, I might explain there, that is assuming the bullet passed through some other object. The exit hole on a piece of cloth, the bullet entering on one side and exiting on the other there might be possibly traces of the powder on the exit side but if the bullet pased through some other object such as a body, there would be nothing around the hole.

Q. Where it exited?

A. Where it exited.

Q. Very well, now did you examine the inside of the garment of the dress around each hole?

A. Yes.

Q. And did you find any unburned powder particles on the inside of the garment?

A. Only in one case I found a few particles on the hole, as I recall in the back, but they appeared to have penetrated just through the fiber, not all the particles were on the outside, there were a couple of lose ones on the inside, whether they were transferred by the garment having been folded up or whether they had actually penetrated through the fabric, I don't know, most of the deposits were on the outside and in the case of a dark ring around the hole, all of them were on the outside.

Q. The one in the back did have traces of nitrate around the hole, did it not?

A. Yes.

Q. So that you are positive then, the one in the back is an entrance hole?

A. Yes.

Q. Not only because of the nitrates but because of the [fol. 835] unburned powder which you found too, around the hole?

A. Yes.

* * * * * * *

[fol. 836] Mr. Walter S. Anderson, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: What is your full name please?
The Witness: Walter S. Anderson.

Mr. Grinnell:

Q. Mr. Anderson, you are employed by the County of Butte, is that correct?

A. Yes, sir.

Q. And as Chief Investigator in the Butte County [fol. 837] Sheriff's office, is that correct?

A. Yes.

Q. Were you so employed on the 2nd and 3rd of August, 1958?

A. Yes, sir.

Q. And as Chief investigator it is part of your duties to take over whenever any offense has been committed, is that correct; take over the investigation, is that correct?

A. Yes, sir, it is handled out of my office.

Q. Did you talk to the defendant, Jack Atchley at any time after the body of his wife was found in the early morning hours of August 3rd, 1958 at 384 Nevada Street in the City of Gridley?

A. Yes, sir, I talked to Mr. Atchley in the Sheriff's office, in our interrogation office about 6 a.m.

Q. Six a.m., as far as you know are you the first officer in your department to interrogate him?

A. I believe so, yes.

Q. And you talked to him about 6 a.m., is that correct?

A. Yes, sir.

Q. That was before Mr. Lazier had arrived from Sacramento?

A. That is correct.

Q. And at that time did you ask Mr. Atchley if he had any knowledge concerning the death of his wife?

A. I did.

Q. What did he tell you?

A. Well, he told me that he had not been over to Gridley that night, that the last time he was over there was the evening, the Saturday before, on August 2nd, at approximately 5 p.m. in the afternoon and that was the last time he had been to Gridley.

[fol. 838] Q. Did you ask him whether or not he had any knowledge about a 22 firearm?

A. I asked him if he owned one and he said he did not. He said his wife had owned one but that she had sold it some three weeks before.

Q. Did you ask him what the transaction was between he and his wife concerning this gun?

A. I understood him to say that the gun was hers but that she had sold it three weeks before at the Better Deal Exchange, well, rather in front of the Better Deal Exchange to a man by the name of either Brown or Green.

Q. Did you ask him if he had ever owned this gun?

A. He said he had not.

Q. Or a gun, a 22 gun, did you ask him if the had ever owned a 22 pistol?

A. He said he had owned a rifle but not a pistol.

Q. He said he had never owned one?

A. That is right.

Q. But he did say his wife had owned one, is that correct?

A. Yes.

Q. And sold it about three weeks before the time you were talking to him?

A. Yes, sir.

Q. That would be three weeks before the morning of August 3rd, 1958?

A. That is correct.

Q. Did you ask him whether or not he had any information as to any person or persons who might have had any motive for shooting his wife?

A. Well, I asked him if he had any idea who may have done this thing and he mentioned that a former husband, a man by the name of Jones had threatened he had under-[fol. 839] stood some months before. He had heard this from some person who owned a bar, had informed him that she had threatened him—I mean that Mr. Jones had threatened her.

Q. Did you ask him his whereabouts from, we will take midnight on the evening of August 2nd, from Midnight on through the morning hours of August 3rd, 1958?

A. Yes, I did.

Q. And where did he tell you he was from midnight on?

A. Well, he started out early in the evening and said he had visited ——

Q. (Int.) I asked you from midnight on.

A. Well, from midnight on he had just taken two boys that he met at a bar home and had gone to bed at 12:30.

Q. Gone to bed at 12:30?

A. Yes.

Q. And had not gotten out of bed any more that night, or had?

A. No, he stayed in bed.

Q. He stayed in bed?

A. Yes.

Q. Did you ask him too if he could recall any of the details concerning the sale of this gun by his wife to this third party?

A. Yes, I did.

Q. And was he able to give you any of the details concerning that sale?

A. Well, he explained that they had gone to the Better Deal Exchange to buy something and that she had tried to sell the 22 or trade it in the establishment for a 38 revolver but that they did not make any deal. So while he was buying something she went out in the car and when he came out there was a person there standing by the car and [fol. 840] that she had sold the gun to him for $25 or $30.

Q. And did he tell you that he saw any evidence by way of receipt, money, or otherwise as a result of this transaction?

A. Well, he said that she had a Bill of Sale that she was making at that time that *that* he came out, she was making the Bill of Sale to this man.

Q. And did you ask him to describe this man to you?

A. Well, he described the man as medium build, probably 40, 45 years old, not too good a description, wearing Levi's and the only thing he could tell me about his name was either Brown or Green.

Q. Now was Mr. Atchley able to tell you anything else at that time about the shooting of his wife?

A. No, he was not.

Q. Did you talk to Mr. Atchley again that day, that being Sunday?

A. No, not that day, no.

Q. You did not?

A. No.

Q. Did you talk to Mr. Atchley again until Thursday the 7th of August?

A. Yes, on the 7th.

Q. I said, did you talk to him until then?

A. No, I did not.

Q. You did not, all right. What was the occasion for your talking to him on Thursday, August 7th?

A. Well, that was the day that his wife was to be buried and we were taking him over to the mortuary so that he could see his wife for the last time. We left the office around 20 minutes after 12, I.D. Officer Surpa and I and took him over there to view the body.

[fol. 841] Q. About what time did you leave the Sheriff's office?

A. About 20 minutes after 12.

Q. And did you talk to Mr. Atchley on the way over to Gridley?

A. Yes, we talked a little bit on the way over, most of our conversation was on our return trip.

Q. And who was present in the car besides yourself on the return trip?

A. The same officer that went over with me, I.D.Officer John Surpa and Mr. Atchley.

Q. And who was driving the car?

A. Mr. Surpa.

Q. And where were you seated?

A. I was in the back seat with Mr. Atchley.

Q. You two were in the back seat and Mr. Surpa was in the front seat driving?

A. Yes.

Q. Now did you ask him at that time whether or not he had gone to Gridley after midnight on the evening, the night of August 2nd and the early morning hours of August 3rd?

A. Yes, I did.

Q. And what did he tell you at that time?

A. He told me he had gone to Gridley.

Q. Now is this the first time that he had told you that he had gone to Gridley, I am talking about yourself?

A. Yes, it is.

Q. Did you ask him at that time whether or not he had taken a gun with him to Gridley when he went?

A. Yes, he said he did.

Q. And did you ask him what type of a gun he had taken?

[fol. 842] A. He told me it was a 22 automatic.

Q. Did you have the gun in your possession at that to show him?

A. No, sir, I did not.

Q. He just identified it as a 22 automatic. All right, did he tell you what he did with that gun, Mr. Anderson?

A. He said he had it on the seat of the car when he got over there.

Q. And did he tell you about what time he arrived?

A. He thought it was around 2 or 2:05 a.m.

Q. And did he tell you where he parked his car?

A. Yes, he said about a block up the street on Nevada.

Q. Would you look at the aerial photograph on the board, take a minute to familiarize yourself with it and see if you can point out to us where he told you that he parked his car.

A. Up in this vicinity here, about midway up he said.

Q. And is there a car parked there?

A. Yes, there is a car parked there.

Q. And that is about where he told you his car was parked that day?

A. Yes.

. . . . . .

[fol. 843] Mr. Grinnell: Did Mr. Atchley tell you what route he followed when he left the car?

A. Yes, he did.

Q. And would you tell us at this time what he told you?

A. He told us he parked the car, put the gun in his belt, crossed the street, went down to the corner of Nevada.

Q. Would you indicate, I asked you to indicate on the board where he went.

A. He said he parked the car here (indicating on board) crossed over across the street, went down the sidewalk to this corner, turned and went over to this alley, up the alley to the rear of his wife's home, in the gate, and then he went over and stood under a walnut tree. (Indicating)

Q. And is this walnut tree in the yard of the Atchley residence or in some other——

A. (Int.) He did not explain which tree it was.

Q. He did not?

A. But he said it was a walnut tree and he stood under the tree.

Q. And did he tell you how long he waited there?

A. He said between 5 and 15 minutes.

Q. Did he tell you whether or not he went into a little shed located to the side of the Atchley residence?

A. He said he did not go into the shed.

Q. He said he did not go into the shed?

A. That is correct.

Q. Did he tell you whether or not he was waiting there when his wife came home?

A. Yes, he was.

Q. And did he tell you about what time she arrived home?

[fol. 844] A. He didn't know exactly what time, but he said between 5 and 15 minutes after he had stopped there, she came driving by and at that time he walked out to the front of the house.

Q. You may be seated again, Mr. Anderson. Now did he tell you where his wife parked the car?

A. In the car port.

Q. And where is that located?

A. Well, that was right along side the front yard or south of the yard.

Q. I am going to show you 16-G, which has been admitted into evidence and ask you if you recognize that photograph, Mr. Anderson?

A. Yes, that is the scene as I saw it there, of course the car wasn't there when I was at the scene but that is the scene.

Q. But you recognized the house and the front yard?

A. Yes.

Q. And is the car parked where he told you it was parked?

A. He didn't tell me exactly how it was parked there, he said she drove into the car port, and that is the car port.

Q. And that is the car port?

A. Yes.

Q. Very well, did he tell you where he was when she drove in?

A. He said he was at the corner of the house there on the side.

Q. And which corner of the house?

A. Well, that would be the north—that would be the northeast corner.

Q. Did he tell you whether or not he had the pistol in his hand or in his belt?

A. He said the pistol was in his belt.

Q. Did he tell you whether or not Mrs. Atchley got out of the car?

[for. 845] A. Yes, he said she did.

Q. Did he tell you what she did when she got out of the car?

A. Well, she walked along the front of the yard and came through the front gate and up the sidewalk to the front door of the house.

Q. And did he tell you where he was when she came up through the front gate and up towards the house?

A. He was standing at the corner there.

Q. At the corner of which house?

A. Of her house, I mean the northeast corner.

Q. I am showing you People's Exhibit 13 in evidence, do you recognize the corner of the house that you have just mentioned, in that photograph?

A. Yes.

Q. And would you stand up and point that out to the jury please.

A. Well, it would be this corner right here (indicating).

Mr. King: May I see where you are pointing, Officer?

The Witness: With my forefinger (indicating).

Mr. Grinnell: I want something to mark, to have you put a mark. (questioning witness) Would you put a mark on the photograph where Mr. Atchley told you he stood and waited for his wife.

A. (Indicating)

Mr. Grinnell: Pass that along (handing to jury). (Questioning witness) Now this corner of the house that you have marked is on the opposite side of the house from where the car port was located, is that correct?

A. Yes, sir.

Q. In other words the car port is located on the south side of the house?

A. Yes, sir.

[fol. 846] Q. And the corner of the house that he waited is on the north side of the house, is that correct?

A. Yes.

Q. How did he tell you what he did as she walked through the gate and up the walk towards the house?

A. He explained that as she approached the front steps there leading into the house that he stepped around the corner.

Q. And about how far would you estimate it is from the corner of the house, Mr. Anderson, to the sidewalk that

he told you she walking up, if you will look at this diagram here showing the front of the Atchley house, will you step up please. Now take a look at that diagram for just a moment and I will ask you if you see the diagram of the walkway on there, Mr. Anderson?

A. Well, this is the walkway (indicating).

Q. And do you see the corner of the house?

A. This is the corner where he was waiting, he didn't say exactly where he was staying, he merely stayed at the corner.

Q. About how far from the corner of the house is it to the walkway?

A. It is just a few feet, I don't remember exactly, four or five feet from here to here (indicating).

Q. Did he say about how far she had walked up the walkway when he stepped out from the corner of the house?

A. The way he explained it to me she must have been just ready to step up on here (indicating) or right up on here, just before she came up here when he stepped around and she saw him.

Q. Did he say whether or not he said anything to her or [fol. 847] she said anything to him at that time?

A. He said that she said something to him but he didn't recall what it was.

Q. Did he state to you whether he said anything to her?

A. He didn't mention that he had said anything to her.

Q. Did you ask him what happened at that time?

A. Yes, he said that when she saw him she at the same time saw the butt of the pistol in his belt and that she reached for it and got it out so he grabbed her with both hands and they struggled and in the struggle the gun went off three times and then in order to get rid of her he shoved her and she fell back leaving the gun in his hand and it went off two times more.

Q. Did he say where she was in relation to the ground when the gun went off the second time, last two times?

A. No, he explained that when he pushed her she kind of fell backwards and he didn't explain exactly where she fell but she fell backwards and down.

Q. Did you ask him whether or not he knew where she had been shot?

A. No, I did not.

Q. Did you ask him, Mr. Anderson, whether or not he had loaded this gun that he took over to Gridley?

A. He explained the gun, he stated that sometime prior to her moving to Gridley they had some cats coming around there and trying to get their chickens and he took the gun out and loaded it fully, he didn't know whether it held 8 or 9 shells but he loaded it fully.

Q. Did you check the gun yourself, Mr. Anderson, to determine how many shells the clip holds?

A. The clip holds 9.

[fol. 848] Q. And you checked that yourself?

A. Yes.

Q. And the clip is this—would you remove it please, this is the clip?

A. Yes.

Q. And it is fed by a spring, is it not?

A. That is right.

Q. And you push it down and put how many shells did you say?

A. Nine.

Q. Nine shells and they automatically feed as they are fired into the firing chamber of the gun, is that correct?

A. Yes.

Q. So that this clip holds nine shells, is that correct?

A. Yes.

Q. And he told you, or was unable to tell you how many shots, bullets he had put in the clip?

A. No, he said he filled it up and that it holds eight or nine, he didn't know.

Q. He said he filled it up?

A. Yes.

Q. And this would be about when in relation to the shooting, Mr. Anderson?

A. Well, that would be a month or more before, shortly before she moved over, about five weeks before the shooting.

Q. By the way, at this time he admitted to you, did he not, that the story about the sale of the gun by his wife to this man Brown or Green was not true?

A. No, he never did change his statement.

Q. He never did change that part of it to you?

A. Not to me, no.

Q. Now did he tell you whether or not he had fired any

shots out of that gun after he had loaded it and before [fol. 849] the shooting that night?

A. Yes, he said that the day that they loaded it she went out and took two shots at a cat and missed.

Q. When was this?

A. That was at the back of the house in Palermo.

Q. At the back of there house in Palermo, that was two shots, so if it held nine that would be seven.

A. He said he fired one also and also missed.

Q. So he said she fired two?

A. That is right.

Q. That would leave seven?

A. That is right.

Q. And then did he say whether or not he fired any?

A. He said that he fired one.

Q. So that would leave how many shots?

A. Five or six depending upon whether it was fully loaded or not.

Q. And did you ask him whether or not he knew that night other than by the process of elimination exactly how many shots were in the gun?

A. He said he did not know exactly how many.

Q. When he went over to Gridley?

A. That is right.

Q. Did you ask him whether or not he checked the gun when he came back to Oroville, or Palermo, to determine whether or not there were any shells left in the gun?

A. Yes, he said that when he came back to Palermo he took the gun out from under the seat where he had placed it and worked the action back and saw that there were no more shells in it.

Q. And then did he tell you what he did with the gun? [fols. 850-857] A. He said he buried it in the back yard.

Q. Did he tell you whether or not he hid any other article?

A. Well, after he buried the gun he said he went in the house and took the holster out and buried it in the garbage can.

* * * * * * *

Q. Now did he tell you what he did with the gun after the shooting and on the way back to Palermo?

A. Well, after the shooting he got back into his car and he put the gun under the seat, under the front seat.

Q. And what did he do when he got back to Palermo?

A. Well, he took it out from under the seat, checked it, found it was empty and buried it in the back yard.

. . . . . .

[fol. 858] Q. Now, according to your earlier testimony you were the first officer from the sheriff's office to interrogate Mr. Atchley, is that correct?

A. Yes, sir.

Q. I believe that you stated that was about 6:00 o'clock Sunday morning?

A. Yes, sir.

Q. At that time when you questioned him—— First of all let me ask you if he was dressed, clothed?

A. Yes, sir, he was.

Q. Can you tell us at this time what he was wearing?

A. He was wearing Levi's, a pair of brown shoes, and a sort of a light colored sport shirt.

Q. Did you ask him at that time whether or not those were the clothes that he had worn on Saturday night, the evening preceding?

A. Yes. He said they were the same clothes he had on only he had been in bed when we came after him, or when the officers came after him, and he put the same clothes back on again.

Q. Would you examine this pair of shoes please. Is that the pair of shoes that he was wearing that Saturday—Sunday morning at 6:00 o'clock?

A. Yes, sir.

Q. Did he tell you that those were the shoes that he had worn the night before?

A. He did.

. . . . . .

[fols. 859-860] Mr. Grinnell:

Q. Now, would you examine this shirt and pair of pants.

A. Well, of course, I did not examine these too closely at the time, but that certainly is the shirt he was wearing when I talked to him and those are the pants. Those were

rather new looking at the time and I recall that they had cuffs rolled up on them.

Q. Did he tell you that he was wearing those the evening before?

A. Yes. He said when he got up the put the same clothing back on.

. . . . . .

[fol. 861] As I recall before lunch you told us that on your way back from Gridley on Thursday the 7th of August, in talking to Mr. Atchley he told you that he parked the car where we see a car parked here across the street, that he walked down the street, turned the corner and went into the alley and came in there at the back of the Atchley house?

A. Yes, sir.

Q. Through a gate in the fence, is that correct?

A. Yes, sir.

. . . . . .

[fol. 862] Mr. Grinnell:

Q. I am showing you two photographs now, Mr. Anderson, two of the ones you just examined, and ask you if you can tell us at this time where those photographs were [fol. 863] printed, where the prints of those photographs were made?

A. They were taken approximately across the street, three or four feet from the curb from where the car was supposedly parked on that morning.

. . . . . .

The Witness: They were found approximately in this area, not straight across the street, but slightly south near the curb. I believe the curb would be shown under the trees in the aerial photograph. But near the curb in this area where we found them.

. . . . . .

[fols. 864-869] Mr. Grinnell:

Q. Now, let me show you a photograph A and ask you what photograph A purports to be?

A. That is the heel print of the right shoe. It was the first print we observed in our search for prints.

Q. A is of the right heel?

A. Yes.

Q. And what is B?

A. B is approximately one step closer to the curb and it would be the opposite shoe or the left.

. . . . . .

Q. Did you examine the heels of the shoes worn by Mr. Atchley?

A. Yes, we did.

Q. Did you note anything about the heels that is shown in each one of these photographs?

A. Right at the scene where we found them we brought the shoes over and compared them. We noticed a tack in each shoe, not identical to each shoe but a tack in the heel which fit the print to our satisfaction.

. . . . . .

[fols. 870-872] Mr. Grinnell:

Q. I am showing you——.

I am showing the witness now, Your Honor, People's Exhibit "18-B" for identification.

Q. Were you present when that photograph was taken?

A. That was taken at the head of the alley. It would be the same as the picture I just identified where his left finger would be pointing and it shows the right heel print as he made the turn going up into the alley.

Q. This is one of the heel prints Mr. Gillick is pointing to in the last photograph?

A. Yes, sir.

Mr. Grinnell. I am showing the witness now People's Exhibit "18-A" for identification, Your Honor, and——.

Q. I will ask you if you recognize that photograph?

A. This is the one he is pointing to with his right hand. It shows the right heel print also.

Q. And those are both taken at the same position, to-wit, the corner? Is that correct?

A. The corner into the alley, yes, sir.

. . . . . .

[fol. 873] Cross-examination

By Mr. King:

Q. May it please the Court, now, Mr. Anderson, on these photographs of these footprints did you discuss—I will put it this way, you had discussed with the accused, with Jack here, that he came down this street here, around that corner and into the alley, is that what he said?

A. Yes.

Q. On your trip to mortuary?

A. Yes.

Q. By the way he asked you to go over to the mortuary, didn't he?

A. I can't answer that, counsel. I understand that we received a call from the Undersheriff telling us Mr. Atchley wanted to see the remains and for us to take him over and I surmised he had asked.

Q. Did he talk about his deceased wife that day when you took him over there?

A. Yes, some.

Q. He told you he was in love with her, did he not?

A. That is right, he did.

Q. And he was grieving over her death, was he not?

A. Well, yes, he wasn't really upset but he was, he wanted to see her naturally.

Q. Well, you mean by that he wasn't actually weeping tears but he was upset, wasn't he?

A. He seemed normal, but then I guess he was upset, yes.

Q. Of course you couldn't put yourself in his position because you have never gone through that same thing, have you?

A. That is right.

[fol. 874] Q. So that it would be fair to say he requested to go over to see the remains of his deceased wife and he told you that he was in love with her, that is correct?

A. Yes.

Q. But you did have a considerable conversation with him in the presence of the other officer going over and coming back, that is correct, isn't it?

A. Yes, sir.

Q. And he didn't appear to be reluctant to discuss the matter with you at that time?

A. No, sir, that is right, it was rather voluntary.

Q. He told you what happened, didn't he?

A. Yes, sir.

Q. And he went into the fact at that time, did he not, about her reaching for the gun?

A. Yes.

Q. And about scuffling and about the gun going off and killing her, that is correct?

A. Yes, sir.

Q. Now you knew that he had made statements similar right immediately the next day after the shooting too, do you not?

A. Yes, I heard about it.

Q. In other words this first conversation or story or whatever it was that Officer Lazier heard and the first story you heard you thought were fabrications, didn't you, I mean to say you kept pressing him for other facts concerning the shooting even after he had told you something about the shooting the first day.

A. Well, the first time I talked with him I had not been over to Gridley, and the only facts about the case is what I learned by talked to Mr. Scharsch and what I had heard from the officers periodically over the air and that was all [fol. 875] I knew about the case. I didn't know too much about the facts and I asked him about the story. I was the first one to interrogate him and the story I related was exactly what he told me.

. . . . . .

[fol. 876] Q. Now you say he appeared to be free in his conversation with you when you took him over to the mortuary on that day. You questioned him at some length about what time he went over there, did you?

A. Yes, sir.

Q. And what time did he say he went over there?.

A. Well, he said at the time of the shooting, he said he arrived around 2 or 2:05 a.m. on Sunday morning.

Q. Had you checked the time of the shooting in your mind from your investigation?

A. Just through the report, that it was around 2:25 a.m.

Q. Now are you testifying that the defendant said that he got there around 2 or 2:05, is that what you have said?

A. I am testifying that was what he told me.

Q. Yes. Did you go into the time with him very closely or did you ask him—let me ask you this question. I will withdraw that question. Did you ask him how he arrived at the time of 2:05 or thereabouts?

A. No, I didn't ask him that, he made that statement.

[fols. 877-878] Q. Well, you didn't ask him if he had a watch?

A. I asked him if he heard the fire whistle and he said he did not and we know the fire whistle was around 2 a.m. or at least that was what we had heard.

Q. That would lead you to believe he hadn't arrive- before the fire whistle if he hadn't heard it

A. If what he was telling me was the truth, yes, sir.

Q. Well, you knew what he told you to be the truth, did you on that?

A. Well, I figured it was close, sir——

Q. (Int.) You figured it was substantially the truth, didn't you?

A. Well, it started fit in the line of evidence and tracing tracks and so forth.

Q. But he never denied, did he, that he went around that way, there is no denial of that at all?

A. Not after the first time I talked to him, no, sir.

Q. He volunteered that information to you even before he knew you had any pictures or anything of that sort, isn't that right?

A. I don't know what he knew, sir.

Q. You wouldn't know. He wouldn't know what the Sheriff's office investigator was doing at all, would he?

A. I don't know, he seemed to find out a lot.

Q. Well, now, I don't understand just exactly what you mean by that.

A. Well, for instance he knew that we had the gun before anybody told him in the Sheriff's office.

* * * * * * *

[fol. 879] Q. Well, isn't it usual when a man has indicated he knows something about a crime of this sort that you take him back to the scene and let him re-enact it?

A. Often, yes.

Q. Why wasn't it done in this ese, if you didn't do it why didn't somebody else?

A. I don't know about that, but the way he gave me the story he was in the back yard when he saw his wife drive up and then he walked to the side. From the way he explained it he had to be hidden because he said that when she approached the step he stepped out and she saw him.

Q. When she approached the step?

A. In other words she had gotten out of the car, walked around the front part of the side-walk, through the arbor [fol. 880] gate, and up the sidewalk to the steps and that was when he stepped out and that was when she saw him.

Q. That was your impression of what he said to you?

A. Yes.

Q. But may I ask you, when he said he stood at the corner, did you ask him if he was standing in the walkway at the corner or where he was standing at the corner?

A. I didn't ask him exactly where, no.

Q. Well, you just made up your mind he was standing there, close to the building, didn't you?

A. Well, he said he was at the corner and that when she approached the steps he stepped out and she saw him, otherwise she would have seen him before.

Q. What part of the corner, there is a walk-a-way, Mr. Anderson, could he have been standing here in this walk-a-way when she drove up here. You mean by the corner, that he was right up against the house, what do you mean by the corner?

A. Right at the corner of the house, the way he explained it to me it must have been in this area where she couldn't see him when she walked from the car around here and up to this point here (indicating on photograph) but whether the light was in such a way he would have

been in the shadows here or what, I don't know, but that is the way he explained it to me.

Q. It is a fact you built this whole case, have you not, Officer—rather I will withdraw that. Rather you have developed this case or investigated the case with the idea that the accused was lying in wait, hasn't that been your theory on this?

A. Well, he told me he waited for five to fifteen minutes.

[fol. 881] Q. Well, all right, and then he told you what he was doing then, too, didn't he?

A. Yes, he smoked a cigarette.

Q. He was standing there smoking waiting for his wife to come home. He told you further, did he not, that he had reason to believe she was out with some other man that night?

A. He didn't tell me that, no.

Q. But you know that to be a fact that he had made that admission to some one else?

A. I know he made that admission to somebody else.

Q. All right now, when he said he was standing at the corner of this house, you naturally supposed he was hiding behind that corner, didn't you?

A. Yes, I did.

Q. Because in your mind you have the idea that he was lying in wait, isn't that the idea?

A. No, sir, because he told me that she come up to the steps and he stepped out and that was when she saw him otherwise she would have seen him before.

Q. Maybe that might be true, that was the first time when he stepped around the corner that she saw him. Didn't he tell you that he heard the car drive up and knew the car had driven into the little carport?

A. He told me he was under the walnut tree when he saw the car drive by, and he knew it was the car and her and that she would drive into the car port and that is when he walked up to the corner of the house and waited for her to get out of the car and come into the walk-way.

Q. Yes, and he could see her coming into the walk-a-way, could he not?

A. I imagine.

[fol. 882] Q. And as she alked up to the door he went

up and spoke to her, that is very important, did he say he spoke to her?

A. No, he didn't.

Q. Did she speak to him?

A. He said she said something but he couldn't recall what it was.

Q. And you are sure he didn't at that moment, at that precise moment, when he stepped up there to the corner and she was walking up to the front door, are you sure that he didn't tell you that he said, "Honey, why are you staying out so late" or something of that sort.

A. He didn't tell me.

Q. But he did tell you that he had the gun in the front of his trousers?

A. Yes, sir.

Q. And he did tell you that she reached for it?

A. Yes.

Q. And there was a scuffle?

A. Yes, sir.

Q. And that the gun went off?

A. Yes, sir.

Q. And that there was some pushing and shoving there?

A. He said he pushed her.

Q. Did he tell you how many shots were fired that night?

A. He told me during the struggle there was three and after he pushed her there were two more while he had the gun, altogether five shots.

. . . . . .

[fols. 883-887] Q. Now how many conversations did you have with the accused at all times?

A. Just those two times, the first one on that morning and the one on the 7th.

. . . . . .

[fol. 888] MR. DONALD AWALT, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: May I have your full name please?
The Witness: Donald Awalt.

Mr. Mulkey:

Q. Your name is Donald Awalt?
A. Yes.
Q. And where do you live, Mr. Awalt?
A. Chico.
Q. And by whom are you employed?
A. Paul Smith, International Truck Dealer.
Q. Truck company over there in Chico?
A. Yes.

. . . . . .

Mr. Mulkey: Q. Mr. Awalt, calling your attention to [fol. 889] the Monday, the 4th of August of this year, you were a trustee at the Butte County Jail, were you not?
A. Yes, sir.
Q. And were you asked on that date to go out to what was described to you as the Atchley residence in Palermo?
A. Yes, sir.
Q. You were taken out there by Deputy Surpa?
A. Yes.
Q. And what were you asked to do when you got out there?
A. Look for a gun.
Q. Look for a gun. Were you told where the gun was or any specific place to look?
A. No, sir.
Q. You just were suppose to comb the grounds, is that it?
A. Yes, sir.

. . . . . .

[fol. 890] Mr. Mulkey:

Q. Would you describe what the pictures indicate to you?
A. Well, this is the back yard here as I recall and the trailer there (indicating).
Q. Is this the area in which you searched for the gun?
A. Yes.

. . . . . .

Mr. Mulkey: And People's Exhibit 7 for Identification. (Questioning witness) Would you describe that, sir?
A. That is the same area there.
Q. Little closer view of it perhaps?
A. Yes.
Q. And this is the area in which you searched for the gun, is that right?
A. Yes.

. . . . . .

[fol. 891] Mr. Mulkey:

Q. Now this was in the Palermo area that you made this search, was it not?
A. Yes, sir.
Q. And do you recall how many men went out with you to search for the gun?
A. I don't remember exactly but I think there was four, I believe three or four, something like that.
Q. And you were all searching various areas around this Atchley residence, is that right?
A. Yes, sir.
Q. And did you find the gun?
A. Yes, sir.
Q. And I show you here a 22 Ruger pistol, does that appear to be the gun you found?
A. Yes, sir, similar it looks.
Q. You found one that looks just exactly like that?
A. Yes, sir.

. . . . . .

[fol. 892] Mr. Mulkey:

Q. I show you People's Exhibit 2 A and ask you if you can tell me from that photograph where you found the gun?

A. Yes, sir, it was in this hole, right here, right beside there (indicating).

Q. Would you just draw a big "X" on that picture right over what you say is the hole where you found the gun, great big "X", draw it completely over the hole.

A. (Witness does as requested).

Q. And do you know in that picture what covered that hole?

A. Yes, sir.

Q. What was that?

A. This clod right here.

. . . . . .

[fol. 893] Mr. John C. Serpa, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: May I have your full name please?

The Witness: John C. Serpa.

Mr. Mulkey:

Q. You are a deputy employed by the Butte County Sheriff's Office, are you not, Mr. Serpa?

A. I am.

Q. In calling your attention to Monday, the 4th of August of this year, did you have occasion to accompany a detail of trustees out to the Atchley residence in Palermo?

A. I did.

Q. And what was the purpose of this particular detail?

A. To look for a weapon.

Q. To look for a weapon and one of the members of your detail was a Mr. Awalt, was he not?

A. Yes, sir.

Q. And did he discover a weapon?

A. Yes, sir, he did.

Q. And did he point it out to you?
A. He did.
Q. And is this that weapon? (indicating)
A. Yes, it is.
Q. You tagged that weapon yourself?
A. Right.
Q. And this is the gun that was discovered at the rear of [fol. 894] the Atchley premises by Mr. Awalt on the 4th of August of this year?
A. Yes, sir.

OFFER IN EVIDENCE

Mr. Mulkey: I would like to offer this weapon in evidence, Your Honor.
The Court: It will be admitted.
Mr. Mulkey: That heretofore was marked for Identification being Exhibit No. 1.
The Court: That will be introduced then as People's Exhibit 1.

. . . . . .

[fols. 895-899] Mr. Mulkey:

Q. Now did you also have occasion, Deputy Serpa, during the course of your investigation to make certain pictures of the Atchley automobile, Jack Atchley's Nash automobile?
A. Yes, I was asked to go down to the garage and photograph it.
Q. Do you recall when you make those photographs?
A. It was the same afternoon.
Q. Same afternoon, that would be the afternoon of the 4th of August?
A. Yes, sir.
Q. And I show you here People's Exhibit 8 for Identification and ask you if you can tell us what that depicts?
A. It depicts the back end of the Nash Rambler showing the license plate number, also the emergency sticker number on the rear bumper.
Q. This is Jack Atchley's automobile by registration?
A. Yes, sir.

. . . . . .

[fol. 900] Cross-examination.

. . . . . .

Q. How did you know it was Jack Atchley's car?
A. Well, a teletype was sent on it stating he was the sole owner of the automobile.

. . . . . .

[fol. 901] CLIFFORD ALTON O'BRIEN, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Will you state your full name please?
A. Clifford Alton O'Brien.
Q. Where do you live now, Mr. O'Brien?
A. 1645 Robinson.
Q. Here in Oroville?
A. Yes.
Q. You are working where?
A. At the Ritz.
Q. The Ritz Cafe?
A. Yes.
Q. On the 4th of August, 1958, you were a trusty along with the gentleman that just testified?
A. Yes, sir.
Q. You were a member of a party that went out to the Atchley residence in Palermo that Monday morning, is that correct?
A. That's right.
Q. About what time if you recall did you arrive at the Atchley residence that morning in Palermo?
A. I really couldn't say. I would say possibly sometime around 10:00 o'clock in the morning.
Q. Do you recall about how many people were with you?
A. Well, I believe there were two officers and three [fol. 902] other trusties.

Q. Three trusties and two officers? Five altogether then, is that correct?

A. Five with me, that is correct.

Q. After you arrived there what did you commence to do?

A. Searched the premises.

Q. Where did you search?

A. Well, I searched both houses, and then we went over the back yard looking for shells and so forth.

Q. Did you yourself go into the back yard?

A. Yes.

Q. Did you find anything in the back yard?

A. Yes. I found the holster.

Q. Did you find this holster?

A. Yes.

Q. I want you to look at the photographs, these two photographs that are placed on the lower portion of the board, and ask you if you recognize those two photographs?

A. (Nodding affirmatively.)

Q. You are shaking your head and the reporter can not get it.

A. Yes, I do recognize them.

Q. Thank you very much. What do those photographs represent?

A. Well, those are the houses that we searched that particular morning.

Q. How about out in back? Is that the area that you search also?

A. That is correct.

Q. Now, what is shown as the area in front of the houses, that is actually the front of the house or the back of the house?

A. That is the back of the house.

[fol. 903] Q. In other words, the road is on out in front where you see the telephone pole and the wires going along, is that correct?

A. That's right.

Q. Do you see any person in either one of those pictures that you recognize?

A. (Nodding affirmatively.)

Q. Who is that?

A. Let's see.

Q. Let me ask you this. Do you see Deputy Brown in either one of those pictures?

A. Yes. Right here with the stick.

Q. Would you look in the other picture and see if you see him in the other one?

A. Yes. Right here.

Q. Now, is there a 55-gallon drum in that picture close to Deputy Brown?

A. Yes, sir. Right here.

Q. And is it shown in the other picture also?

A. Right here.

Q. You are indicating then right to the front of that—. What is that? A house trailer?

A. Yes, sir, an old abandoned house trailer.

Q. Now, did you yourself look in that 55-gallon drum that you have indicated?

A. Yes, sir, I did.

Q. What if anything did you find in there?

A. After I dumped the contents on the ground as you can see here I rummaged through it and I found that holster (indicating).

Q. Did you look in the can before you dumped it out on the ground?

A. Yes.

Q. Was the holster apparent when you looked into the can?

[fol. 904] A. No.

Q. Then you dumped it out on the ground?

A. That is correct.

Q. You found this holster?

A. That's the same one.

Q. In the contents you dumped out on the ground, is that correct?

A. That's right.

Q. What did you do with the holster then?

A. Well, I either gave it to John or Deputy Brown.

Q. One of the two officers?

A. Yes. I believe it was Brown that I gave it to.

Q. Do you see any mark on the holster?

A. Right here. He marked it right there.

Q. So that is marked on there by the officer you gave it to?

A. That's right.

Q. Would you describe generally speaking the contents of this can, this garbage can?

A. It was a trash barrel, a barrel that you would burn papers in.

Q. Was there any unburned material in the can?

A. No, sir, there wasn't.

Q. Were there ashes in the can?

A. It was all ashes.

Q. Were there any tin cans in the can?

A. A few.

Q. A few tin cans, and a few ashes?

A. Yes.

. . . . . .

[fol. 905] Q. Can you tell us where this was down in the can then, if you know?

A. Well, it is pretty hard to say definitely. I would say it would have to be somewheres six inches to a foot under the ashes, or possibly even more than that.

Q. Was it covered with ashes or debris from the can when you removed it?

A. Oh, yes, definitely covered.

. . . . . .

[fol. 906] Redirect examination.

. . . . . .

[fols. 907-911] Q. It was not your understanding when you went out there then or you were not told where to look when you went out there for either the gun or the holster?

A. No, sir. As a matter of fact, I mentioned looking in the trash barrel and someone said they done it the day before, or poked around in it the day before.

Q. So far as you know you were not told where either one of these items were?

A. That's right.

. . . . . .

[fol. 912] Mr. Richard Brush, a witness previously duly sworn on behalf of the People, resumes the stand for further interrogation.

Direct examination.

Mr. Mulkey:

Q. You are reminded, Deputy Brush, you have heretofore been sworn and your testimony is under oath. I believe you told us heretofore, Deputy Brush, that you arrived on the scene out there about 3:05 or 3:07, something of that nature?

A. 3:07.

Q. And you observed Mrs. Atchley lying on the ground in front of the house?

A. Yes, sir.

Q. And I show you here a dress and ask you if you recognize that dress?

A. Yes, sir.

Q. Would you tell us what dress that is?

A. This is the dress that the deceased was wearing.

Q. As she lay there on the ground in front of her home?

A. Yes, sir.

Offers in Evidence

Mr. Mulkey: This was People's Exhibit 5 for identification, this dress and I would now like to offer it in evidence.

The Court: It will be admitted in evidence as People's [fol. 913] Exhibit 5.

People's Exhibit No. 5

In Evidence.

Dress with holes and blood on it.

Mr. Mulkey:

Q. Now also in your testimony yesterday, of the last time you testified before this jury, you indicated on your map there I believe five little dots indicating where you found shell casing?

A. Yes, sir.

Q. I show you here People's Exhibit 25 for Identification and ask you if you can tell us what that is?

A. These are the five empty casings that I found.

Q. As indicated on your map up here?

A. Yes, sir.

Mr. Mulkey: Thank you, I would like to offer——

Mr. King: May I see it please.

(Mr. Mulkey hands photograph to Mr. King:)

Mr. Mulkey: I should like to offer——

The Court: (Int.) They may be admitted as People's Exhibit No. 25.

Mr. Mulkey: Thank you, Your Honor.

PEOPLE'S EXHIBIT No. 25

In Evidence.

Photograph showing five empty casings.

[fol. 914] Mr. Mulkey:

Q. Finally, Deputy Brush, you had occasion to visit the funeral parlor or mortuary over there where the post was done on Mrs. Atchley?

A. Yes.

Q. And I show you here a vial and ask you if you recognize that?

A. Yes, sir, these are the slugs that I received from Doctor Richardson.

Q. Did you see Doctor Richardson take those slugs from the body of Mrs. Atchley?

A. That I did.

. . . . . .

[fol. 915] They are admitted as People's Exhibit No. 24.

. . . . . .

Q. On the morning of August 4th or August 3rd, pardon me, the day of the occurrence here, did you have occasion to visit Mr. Atchley's home early in that morning?

A. Yes, sir, I did.

. . . . . .

[fol. 916] A. It was 6 o'clock on the morning of the 3rd.

Q. And did you observe a vehicle at the Atchley residence?

A. Yes, sir.

Q. I show you here People's Exhibit 9, can you identify [fols. 917-918] the vehicle indicated in that exhibit?

A. That looks like the vehicle that was sitting in the Atchley yard.

* * * * * * *

[fol. 919] Mr. Fred O. Spann, a witness produced on be- [fol. 920] half of the People, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: Will you state your full name please?

The Witness: Fred O. Spann.

Mr. Mulkey:

Q. You are the Undersheriff of Butte County, is that right?

A. Yes, sir.

Q. And I show you here People's Exhibit 5, do you recognize that, Mr. Spann?

A. Yes, sir.

Q. Did you transport that to Sacramento for testing?

A. On August 8th, I checked this out of the evidence room and transported it to Sacramento and turned it over to Mr. Gilmore of the C.I.I.

Q. Thank you, sir. Now you were on duty on August 4th, were you not, sir?

A. Yes, sir.

Q. And did you have occasion to send a party out to the Atchley residence in Palermo, a group of persons?

A. I did.

Q. And what was this, office personnel or——

A. (Int.) I dispatched two officers, Deputy Brown and Deputy Serpa to make a search, a more thorough search of the grounds surrounding the residence where Mr. Jack Atchley lived.

Q. Did they take some trustees with them, did you dispatch?

A. Yes, they took two or three to assist them.

Q. Now you are the one who sent them out there to make this search, is that right?

A. Yes.

[fols. 921-922] Q. And did you advise them or at that time had you been advised by Mr. Atchley where to look for any gun or holster or anything else when you sent that search party out there?

A. No, sir.

Q. Had you been advised by anybody where the location of any gun or any holster was at the time you sent that party out there to search?

A. No, we had not been.

Q. And did you—you therefore of course did not advise any of the party where to look for anything in particular?

A. No, only the general area.

Q. Actual area?

A. Yes.

* * * * * * *

[fol. 923] MR. CARMAN CARL CRANE, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Your name is Carman Crane?

A. Yes, sir.

Q. And you are employed by the Butte County Sheriff's Office, is that correct?

A. That is correct, sir.

Q. And how long have you been employed by the Butte [fol. 924] County Sheriff's office?

A. Four years.

Q. And I believe that you are a Captain, is that correct?

A. At the present time, sir.

Q. And were you on duty, Captain Crane, on August, the evening of August 2nd, or the early morning hours of August 3rd, 1958, were you on duty?

A. Yes, sir, I was on duty.

Q. And what shift or hours were you working at that time?

A. My shift at that time was from 18 hundred hours or rather 19 hundred hours, that is 7 o'clock in the evening until 3 a.m. the next morning.

Q. Did you, while on duty that night go to the residence of Mrs. Atchley in Gridley? 384 Nevada Street.

A. Yes, sir, I did.

Q. And about what time did you arrive there?

A. I arrived at 4:05 in the morning.

Q. 4:05, and were there other officers there when you arrived?

A. Yes, sir.

Q. And do you recall at this time who they were?

A. Yes, sir, they were Deputy Sheriff Richard Brush of our Department, Chief of Police Charles Gibbs, also Officer William Tamagni of the Gridley Police Department and one of our reserve Bill Hagman, who was riding that shift with Officer Brush.

Q. I am going to show you a picture which has been introduced in evidence as People's Exhibit 16A, and ask you, Mr. Crane if that represents or shows the scene as it was when you arrived.

A. Yes, sir, that is correct, sir.

[fol. 925] Q. The body was still in that position?

A. Yes, sir.

Q. And do you note a purse in that picture, Mr. Crane?

A. Yes, there is a lady's purse right at the edge of the sidewalk.

Q. And did you—was there a diagram made by a member of your department, Mr. Crane?

A. Yes, sir, Officer Brush drew a diagram of the scene.

Q. Now I am going to show you a purse, Mr. Crane, and ask you if you will examine that purse at this time?

A. Yes, sir.

Q. Do you recognize this purse?

A. This is the purse I would say.

Q. That is the purse that is shown in the photograph and also found at the scene that night, is that correct?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Grinnell: Offer this in evidence at this time, Your Honor, as People's Exhibit next in order.

The Court: It may be admitted. It is now People's Exhibit 33.

PEOPLE'S EXHIBIT No. 33

Leather Purse.

. . . . . .

[fol. 926] Q. Well, then, calling your attention, would you stand up just a moment, Mr. Crane, calling your attention, would you put your glasses on, calling your attention to this diagram, stand back so that the jury can see, do you recognize this as a diagram of the front yard of the Atchley residence?

A. Yes, sir, I do.

Q. Now would you take the pointer in your hand and will you look on that diagram and see if you note a point indicated on there where the purse was found?

A. Yes.

Q. Is that noted on the diagram?

A. Yes, this little black dot right here.

Q. And are the letters, "Purse" written right beside it?

A. The word, "Purse" is written in black letters, written directly beneath that black dot.

Q. And that is right at the side of the sidewalk, is that correct?

A. This is the sidewalk right here (indicating).

Q. About midway then, between the house and the fence?

A. I would say approximately that.

. . . . . .

Q. Now there is a small building to the side of the Atchley residence, is there not, a small shed?

A. The side and to the rear.

Q. And that is on the side of the house next to the Scharsch residence, is that correct?

A. Yes, sir.

[fol. 927] Q. And is this little building closer to the front of the house or closer to the back of the Atchley house?

A. It is closer to the back of the Atchley house.

Q. I will show you a photograph now, Mr. Crane, and ask you if you recognize that as the side of the Atchley house with the little shed to the rear thereof?

A. Yes, sir, this is the shed (indicating).

Q. Now it isn't clear from the picture, Mr. Crane, is that shed about even with the back of the house or as it is shown on the diagram, would you turn around and look at the diagram again, is it some distance to the rear of the house as it is shown in the diagram?

A. Well, it is some distance from the rear back to the front of the shed.

Q. And do you recall approximately how far it is from that little shed to the alley in back of the house?

A. Oh, approximately, however, I didn't measure that, I would estimate the distance 25 to 30 feet.

Q. Inside the property line then from the alley?

A. Yes, sir.

Q. All right, you may be seated. Did you go into this little shed after your arrival about 4 o'clock Sunday morning?

A. Not at that time, sir.

Q. At any time after your arrival about 4 o'clock did you go into the little shed, that was my question, sir.

A. I didn't go into the shed at any time at that hour. However, at approximately 8:15 that morning Officer William Tamagni of the Gridley Police Department and I opened the door and peered inside the shed. We did not [fol. 928] enter at that time.

Q. I am going to show you People's Exhibit 20 which has been introduced in Evidence and ask you if this view that is shown is what you saw when you looked into the shed at 8 o'clock or 8:15 on the morning of August 3rd, 1958?

A. Yes, sir, that is it.

Q. And that shows a cardboard box, a sack of something here—you don't know what is in the sack, burlap bag?

A. Those were gunny sacks or burlap bags and they had old walnuts in them, possibly last years crop.

Q. And two cigarette butts on the floor?

A. Two cigarette butts on the floor.

Q. And what did you find *lying* along side the gunny sack and cardboard box, Officer Crane?

A. Well, hanging to the side and near the top of this sack which was, the sack itself was partially smashed down, was human feces.

Q. And does that show in the photograph?

A. Yes, sir.

Q. Would you point it out please?

A. It is this black object right here, it shows black in the picture (indicating).

Q. Now before Court did you examine the contents of this can?

A. Yes, sir.

Q. And are the contents of this can the human feces that you observed there that morning?

A. I would say it is, my identification card is ——

Q. (Int.) Did you take that and place it in this can?

A. Yes, sir.

[fol. 929] Q. And you have examined it before Court this morning?

A. Yes.

Q. And it is still in the same condition as near as possible as it was that morning? Is that correct?

A. It is still wrapped and in the can, yes, sir.

Mr. Grinnell: I will offer this in evidence, your Honor, it has been previously introduced in evidence for identification as People's Exhibit 28.

The Court: It will be admitted in evidence.

* * * * * * * *

Mr. Larry Gillick, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Mulkey:

Q. And your name is Larry Gillick?

A. Yes.

[fol. 930-932] Q. And you are the Sheriff of Butte County?

A. Yes.

Q. Sheriff Gillick, I show you People's Exhibit 27 for Identification and ask you to examine it and tell me when and where you first observe it, if at all.

A. These shorts, sir, were found outside the bathroom window of the Atchley in Palermo on the morning of the 4th of August.

Q. Do you recall approximately when it was you found them there.

A. What time, sir?

Q. Yes.

A. It was between 5:30 and 6 o'clock in the morning, sir.

Q. And you were present when they were picked up?

A. Yes, sir.

Q. Who picked them up?

A. I was along side of Captain Lyle Ishmael when they were picked up, sir.

OFFER IN EVIDENCE

Mr. Mulkey: I would like to offer People's Exhibit 27 for Identification in Evidence.

The Court: It will be admitted in evidence at this time.

* * * * * * *

[fol. 933] MR. CHARLES E. BROWN, JR., a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Mr. Brown, you are employed by the Butte County Sheriff's, is that correct?

A. I am.

Q. And for how long now have you been employed by the Butte County Sheriff's Department?

A. Over two years.

Q. Were you employed by the Sheriff's Office and working in the early part of August of this year?

A. I was.

Q. Did you, or were you asked or were you directed to go either with some one or separately to the Atchley residence in Palermo to make a search and investigation of whatever you could find?

A. I was.

. . . . . .

[fol. 934] Q. So that you were there when the gun and the holster was found, is that correct?

A. I was.

Q. Now did you search anything else while you were there besides in the back yard?

A. I did.

Q. Where did you search?

A. On the 3rd of August I was sent out to search the trunk of the vehicle.

Q. The trunk of what vehicle?

A. Of the Nash Rambler.

Q. Will you look at these two photographs previously marked in evidence as People's Exhibit 8 and 9, did you look in the trunk of that vehicle?

A. Yes.

Q. And where was the car parked at that time?

A. The car was parked in the driveway of the most westerly house on the Atchley property.

Q. That would be the one closest to Brown's Store?

A. Yes.

Q. Or closer to the four corners, if you wish, is that correct?

A. Yes.

Q. What if anything, did you find in the trunk of that car?

A. I found a tool box.

Q. Was the tool box locked or open?

A. The tool box was shut.

Q. I know, but was there a lock on it?

A. I didn't notice a lock on it.

Q. It was not locked then in that it was padlocked?

A. No, it was not padlocked.

Q. Did you look inside this tool box?

A. I opened the cover of the tool box and it contained tools. Also in the trunk was a leather locker box, not

[fol. 935] leather locker box, but a metal locker box, government G.I. size and at that time it was locked but under it located a set of keys.

Q. And where did you find the keys for it?

A. Under the locker box.

Q. Under the locker box in the trunk?

A. Yes.

Q. And did you open this second box?

A. I did.

Q. And did you find anything in it?

A. Yes.

Q. What did you find in it?

A. A box of 22 shells.

. . . . . .

Mr. Grinnell: (Questioning witness) Was Mr. Atchley in custody at this time?

A. He was.

Q. And was he booked for investigation of homicide, 187 of the Penal Code?

A. Yes, he had been booked.

Q. So that he was in jail charged with murder at the time that you went out there?

A. He was in jail charged with investigation.

Q. Of murder?

A. Yes.

. . . . . .

[fol. 936] Q. What did you do with this box of shells after you found it?

A. The ends of the box was contained in a locker box and I locked the locker box and took the locker box with the shells still inside as evidence.

Q. And whom did you turn this box of shells over to?

A. That was the locker box, the box of shells and a pair of boots were also removed from the trunk of the vehicle, were tagged by myself and placed in the evidence room.

Mr. Grinnell: Placed in the evidence room. I will offer this box of shells in evidence at this time, Your Honor, as People's Exhibit next in order.

. . . . . .

[fol. 937] The Court: They are admitted in evidence then as People's Exhibit 29 for all purposes.

* * * * * * *

Mr. Grinnell:

Q. This is the picture of the car in which these were found in the trunk, is that correct?

A. Yes.

Q. However the car was still at the Atchley residence when you removed the container from the trunk?

A. It was.

* * * * * * *

[fol. 938] IN CHAMBERS HEARING

The Court: This is a hearing out of the presence of the jury at which the defendant is present.

Mr. Mulkey, would you present the matter that you presented to the Court when you and counsel for the defendant approached the bench.

Mr. Mulkey: We have a tape recording of a conversa-
[fol. 939] tion between the defendant and Mr. Travers.

Mr. King: What is his last name?

Mr. Mulkey: Travers.

The Court: T-r-a-v-e-r-s?

Mr. Mulkey: Yes. We, of course, must lay a foundation for the tape and we will do so through Mr. Travers. However, because of the delay of our witnesses at this time I felt that after the foundation was laid Mr. King would want a hearing in Chambers to have this tape played. I am therefore offering that at this time. Then I will put Mr. Travers on the stand and lay a foundation for this tape. But this is the tape I propose to play (indicating).

The Court: Now let me understand your proposal, Mr. Mulkey. After laying the foundation as to the time and place and people present of this conversation did you expect the witness Mr. Travers to testify to what the defendant said?

Mr. Mulkey: No, sir. I expect the witness Travers to identify and testify this tape truly records the conversation he had between him and the defendant at the time and place it was taken, and then to play it to the jury.

The Court: Now, for the record would you explain further as to the extent of the knowledge and information of the attorney for the defendant relative to this tape.

Mr. Mulkey: Well——

The Court: You see, I have not been in on——

Mr. Mulkey: The attorney for the defendant heretofore, [fol. 940] and before this Court requested an order directing that we turn over to him prior to the trial of this cause all of our tape recordings to the defendant——

The Court: Including this one?

Mr. Mulkey: I don't think this one was mentioned, but this one was also turned over to him pursuant to that order. And this tape was played in the presence of defense counsel, the defendant himself, and in front of the court reporter, and was duly transcribed by the court reporter, a copy of that transcription being in Mr. King's hands and another copy in our hands.

The Court: Do you have any objection to proceeding in that fashion, Mr. King?

Mr. King: Yes, I do, Your Honor.

The Court: What is the basis of the objection?

Mr. King: On my notice of motion heretofore made in this Court concerning conversations had by the defendant with certain peace officers, which conversations were in the hands of the District Attorney, they did let me hear some transcribed tapes at some considerable length. At my own expense I had a court reporter take down what he could hear from the transcription of the tape recording. Now, I was not aware at the time of my notice of motion that there was any conversation had with this man referred to as Ray Travers, an insurance agent. It was, however, on the tape which was partially transcribed by the court reporter. I will say this so the Court will be aware of how [fol. 941] this tape recording got into this transcription. As I have found out, the defendant was taken down into the attorneys' conference room in the local jail, that the conference room in the local jail was bugged and there was a hidden microphone in the wall, walls of the room or nearby, which did take down a conversation had by the defendant and the insurance agent; that the defendant was unaware that his conversation was being taken down; that he knew nothing at all about his conversation had with the

insurance—withdraw that—knew nothing about—that the conversation was taken down. He felt that his conversation with the insurance agent over a matter of insurance business was a private conversation. He did make certain declarations in that transcription which if made before the jury would be highly prejudicial to his rights; that he did not give the statements except in a confidential manner to his insurance broker; that it is evident from the conversations transcribed that the insurance broker was sent in there by the sheriff's office to elicit information that the defendant might have concerning the case; that the tape recordings are immaterial, privileged, they are self incriminating——

The Court: Pardon me. Now what were your points again, Mr. King.

Mr. King: That the tape recording so taken was privileged.

The Court: What privilege?

[fol. 942] Mr. Mulkey: Yes, what privilege?

The Court: You mean attorney-client?

Mr. King: Insurance broker and client; that they were self incriminating and it violated his privilege of self incrimination; that they were not given freely and voluntarily; that they are not the best evidence. Further, that there—they are inaudible; that they were secretly made; that they are prejudicial; that they contained evidence that is immaterial and incompetent; that there is obviously, from hearing the record and from reading the transcription of that record, that only parts of the conversation were recorded; that there was very evidently a conversation had with this man which was previously had with this man Roy—what is his name again?

Mr. Mulkey: I have given you his name.

The Court: Travers.

Mr. King: Travers—which was not taken down by recording, but that this recording was turned on only at a point in the defendant's conversation with the insurance broker where it would best serve the interests of the prosecution. Further, that the recording machine very obviously was turned off and on at certain stages of the recording and it does not truly give us a complete account of the conversation had at that time. In other words, if the Court

please, the defendant was tricked into making a declaration to his insurance broker which he felt was a private and confidential communication to his broker concerning a [fol. 943] policy of life insurance on the decedent; that it was not given to be transcribed or taken down. And I might say further, Your Honor, that all during the progress of this case I have found out that the counsel room in the local jail is bugged and that all conversations had with people, whether or not lawyer or client, can be taken down. It has been extremely difficult, knowing that, to have any conversation with my client in the confines of the jail.

Mr. Mulkey: Just a moment. I don't think that goes to this objection.

Mr. King: Without knowing it was taken down.

Mr. Mulkey: That doesn't go to this objection in any shape or form.

The Court: The Court is giving it the credit it is entitled to.

Mr. King: I seriously object to the lawyers' room in the jail being bugged and——

The Court: We are not going into that matter.

Mr. King: I will continue my objection, if the Court please. Now, these omissions that I have discussed heretofore could be made at the whim of the operator of the recording device. Very evidently the recording device was outside of the room and being controlled by one of the sheriff's deputies or someone under his supervision. Now, I respectfully submit that a statement of this kind where only the parts that the District Attorney would like to have offered to the jury, would be played to the jury, would be [fol. 944] extremely prejudicial and should not be permitted.

Mr. Grinnell: First of all, Your Honor, if I may answer just that one point, it is evident from listening to the tape, and Mr. Travers will so testify, that that constitutes the entire conversation. And it will be evident from listening to the tape that it was not turned off and on.

Mr. Mulkey: May I play the tape then in answer to Mr. King's——

Mr. Grinnell: About five or ten minutes to listen to the entire tape, and then I think all of Mr. King's objections will be——

Mr. Mulkey: I will then argue the motion.

The Court: No. I am going to pass on to certain matters first and that will simplify it. First, the communications are not privileged under any rule of law that recognizes privilege. The fact that they are self incriminating is not a violation of the Federal Constitution or the State Constitution. At this time, Mr. King, the Court will instruct you not to make an objection on that ground again.

Mr. King: You mean in the presence of the jury?

The Court: In the presence of the jury.

Mr. King: No, I will not, Your Honor.

The Court: It gives a false impression.

Mr. King: You mean you are calling my attention to the objection heretofore made in the record several days [fol. 945] past? I misnamed the section, if the Court please, and it was through inadvertance and mistake.

The Court: Well, I wasn't concerned—I don't know whether it is paragraph five or what paragraph it is. Anyhow it is the guarantee against self incrimination. Now, a person can not be required to testify against himself. That does not go to admissions that he may make to other people. And for you to base an objection on that ground is misleading to the jury and I am instructing you at this time not to use that objection.

Mr. King: Very well, Your Honor.

The Court: Under those circumstances.

Mr. Grinnell: Of course, Your Honor, it is always incumbent upon the People to show these statements were freely and voluntarily given, and that will be part of our foundation. If Mr. King could show me they were given under duress that possibly—that objection might lie.

The Court: Well, that goes to the weight to be given to admissions. If it is a full-fledged confession that is in a different category, and there it does have to be voluntary. But as to admissions, the foundation that it was voluntary does not have to be laid, whether it was or was not voluntary, and to what extent it was voluntary is a matter of cross examination and goes to the weight of the admission. The point that the tape is inaudible and the point that it may contain matter that is incompetent, irrelevant and [fol. 946] immaterial, may be good. And it is necessary and proper for the Court to hear the tape. And I would

like to hear it at this time in order to pass on those portions of the tape. I will pass on one further subject at this time: As to whether or not the tape contains the entire conversation between the witness and the defendant is a matter, of course, that can be developed on direct examination or on cross examination. All right. Will you play the tape please at this time.

Mr. Grinnell: You want to take this down?

The Court: No. First let me ask you this: Mr. Mulkey has handed me a typed transcript now of this tape which begins on page 43. Now, was Mr. King given a copy of this transcript?

Mr. Grinnell: Yes. He has it in his hand, Your Honor.

The Court: When was it given to him?

Mr. Grinnell: About a week ago, didn't we, Joe? We had it for at least a week before the trial started.

The Court: A week before the trial started?

Mr. Grinnell: Yes.

The Court: All right.

(Thereupon the tape recording referred to was played.)

Mr. King: I feel the reporter should take it down, Your Honor, for this reason: That there are several places in the tape where Your Honor will find the conversation, I am sure, if it is the one I am thinking of, when I heard it, it [fol. 947] was inaudible and——

Mr. Mulkey: You are not thinking of the right tape.

Mr. King: —and I feel that——

Mr. Grinnell: In view of the fact he has taken it down once already I won't press the point. But do you want him to take it down again?

Mr. King: If he can hear it.

The Court: I think the defendant has a right to require it if he wishes to.

Mr. Mulkey: May it be stipulated, Your Honor, that if the reporter does not get it clear he may take the tape and play it 100 times if he likes to get it?

Mr. King: I don't think that would bring the information to Your Honor. Your Honor is going to have to pass on a very vital matter here and——

Mr. Mulkey: His Honor is not going to have the benefit of the court reporter's notes to pass on it anyway.

The Court: Now, just a minute, Gentlemen.

Mr. Grinnell: I think we are arguing about something that—. This tape is very audible.

Mr. King: Are you getting that portion of the tape (indicating court reporter)?

The Court Reporter: No.

Mr. King: Just a moment. May we stop the recorder?

Mr. Grinnell: It has not got started yet.

Mr. King: I want to get the first part.

[fol. 948] Mr. Mulkey: I will stop it if he tells me to.

Mr. King: May we stop the recorder and start over again?

The Court. No. I want to hear the tape at this time.

(Thereupon the court reporter heard the following from the tape recorder:)

"Q. I see no reason why the Court wouldn't give it to him. I'll be darned.

A. I see her sister down here trying to do something about it.

"Q. Who is that?

A. Her sister.

"Q. Oh. Wonderful. What is her sister's name?

A. Helen.

"Q. That is Marcella?

A. Yes.

"Q. And her last name is what?

A. I forget what her last name is. Anyhow she didn't want to have the kids with them down there or no say-so over there. I was supposed to have the say-so over the money.

"Q. Of the life insurance?

A. Yes.

"Q. That's still in the underwriting department, Jack, that money, and you have the binder. Now, you have got the binder that was given Marcella?

A. No, she had it in her billfold.

"Q. But it is in her personal effects now?

A. Yes.

"Q. Fine.

A. You will have to go over to the morgue.

"Q. I can get that over at Gridley.

A. Yes. And they can't touch it.

"Q. I got the sheriff's office—been very nice. They are

going to have photostatic copies made of the marriage [fol. 949] license. That is very important, Jack, that you were married.

A. Yes.

"Q. It is a terrible thing, isn't it?

A. Yes. She lied about it all the way around.

"Q. Terrible thing?

A. Yes. She thought we wasn't married.

"Q. She thought you weren't married?

A. Yes. What I can't understand is what the hell she told Goldfine about it.

"Q. I don't know. Darnedest thing I ever heard. Can't understand it.

A. At the welfare department she told them she wasn't married.

"Q. I'll be darned.

A. Yes, sir.

"Q. Can't understand it. Goofiest thing. This is really something. See, we are interested too really how the darn—I mean, how it come about, you know, like you were telling me this morning, and I have got to write a letter to that——

A. I tell you what to do. I want you to go over there where she lives, see.

"Q. In Gridley?

A. Yes. And go to the corner of the house there right next to the front door. And she was standing—she come right up to the door and I stepped out behind the corner right in her face and——

"Q. Say that again. Let me——

A. Standing right at the corner.

"Q. You were standing at the corner of the house?

A. Yes, where she goes into the door, and she comes up to the door and I just steps around the corner and right into her face.

[fol. 950] "Q. I won't write none of this down. I can remember. I don't want nothing on paper.

A. And you will find that out. And she said——

"Q. Tell me something. She lunged. What did she do? When she walked up the walk what exactly did she do?

A. She walked up to the walk and go up to the door and she took her keys out and I don't believe she had her keys

already out and started to reach for the door when I stepped around the corner. And when I stepped around the corner she seen the gun handle sticking out and she reached and grabbed it.

"Q. Where was the gun actually at, Jack?

A. Right in my belt.

"Q. Right in your belt?

A. Yes.

"Q. Then she made—. Go ahead.

A. She made a lunge for it and got it, see.

"Q. Did she get it out of your belt?

A. Yes, she got it plumb out. That's what I was wrestling for, was the gun.

"Q. For God sake.

A. But I ain't going to ever——

"Q. Then what happened after she grabbed the gun out of your belt?

A. When she grabbed the gun out of my belt I grabbed for it, see, and got a hold of the gun, and I bent it back, bent her arm back.

"Q. Towards her again?

A. Yes. And it went off three times.

"Q. Three times?

A. Three times. And then when I pushed her by the shoulder her arm come around, and I guess when I pushed [fol. 951] her I pulled that son-of-a-bitch off two more times.

"Q. In other words, you had the gun in your hand then?

A. Yes.

"Q. Well, I'll be darned. And then it went off twice more. Five times. Then she feel right there, didn't she. That's too bad because I am going to have to write this up and send it in to the company.

A. That's the way it happened so I can't do nothing about it.

"Q. There is one point I should put in there too. Jack, what did you have the gun for in the first place?

A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there. And so—I went back and got it and put it in my belt.

"Q. Where did you find the gun. Where was the gun?

A. The gun that I had?

"Q. Yes, the gun that you had in your belt. Did you bring the gun over with you?

A. Yes.

"Q. Well, you had it with you all that evening and you brought the gun over?

A. Yes.

"Q. And had it in your belt and you waited—. What did you have the gun in your belt for?

A. Well——

"Q. For what purpose?

A. I thought maybe—. I went over there and I said, well, she comes in with somebody, see——

"Q. She was running around with fellows?

A. Yes.

"Q. Oh, I see. God Almighty, that would make a guy feel [fol. 952] sort of bad.

A. Uh-huh.

"Q. Did you just plan on scaring her or scaring him?

A. Yes, just scaring him. But I didn't intend to kill her at all, not at all.

"Q. That was about what time?

A. That was——. I went over there—— She wasn't there, see, and she was still gone.

"Q. That's 2:00 a.m. in the morning she had not arrived home yet and you waited for her behind the house?

A. At the corner of the house.

"Q. And you had the gun in your belt. Did you make an attempt to pull the gun or anything?

A. No, sir. When I seen nobody but her I didn't make no effort whatever.

"Q. She seen the gun?

A. She seen the gun.

"Q. Then what happened?

A. She grabbed it, hanged right on to it. That's all I could do. I didn't know anything else to do.

"Q. I'll be damned. Then you tried to get the gun away from her?

A. Uh-huh.

"Q. That's when it happened. I think I got it pretty straight. Whose gun was it? Was it registered in your name?

A. No, wasn't.

"Q. It wasn't even registered? Where did you buy it?

"A. Bought it from a boy over in Honcut a little over a year ago.

"Q. What was his name?

[fol. 953] A. G. W. something. Forget his last name.

"Q. G. W.? And he lives on Honcut road or right in Honcut?

A. Right in Honcut.

"Q. Boy, oh boy. You got your cigarettes? I got to write this up to the company. We got to think of the children. I want this information. In other words, I mean just what you told me here now, let me see if it is exactly the way. You were supposed to go to a dance at 8:00 o'clock at Robinson's Corner?

A. Yes.

"Q. Is that right?

A. Yes.

"Q. All right. And you had other business to attend to?

A. Yes.

"Q. What type of business?

A. I was up here——. I come down to the insurance office there, and about that time then I went back out and there was some people wanting to rent the house and I went around and seen about this goddamn furniture and stuff and I got back and I went over and eat supper with the old man over there, Thomas, and, hell, it was 9:30 before even——

"Q. 9:30 at night? Then you went back to Palermo?

A. Yes, I went—I was in Palermo then.

"Q. I see.

A. And I said, "Well, I am too goddamned late now." So I goes down to the Dog House and tells the man about the refrigerator.

"Q. The Dog House?

A. Yes, Glenn Hubbard.

"Q. Glenn Hubbard?

A. Yes. Then he goes on down—. No. I picks up two [fol. 954] boys there and wanted me to take them out to the house, so I took them out to the house. And they wanted me to bring them back up there at the Little Shamrock down there so I brought them back down there in front of the Little Shamrock where I had a flat tire and——

"Q. Where did you pick the gun up?

A. I had the gun in the glove compartment.

"Q. You had the gun in the glove compartment?

A. Yes.

"Q. I see. And then what time did you go out to Gridley?

A. Oh, somewheres around 2:00 o'clock.

"Q. Then you were with these fellows up to that time, the flat tire. How long did you wait for her?

A. Oh, about 25 minutes.

"Q. 25 minutes. About 2:20 you told me.

A. Uh-huh.

"Q. So she got out of her car and she walked up the walk and she was by herself?

A. Yes.

"Q. I see. One hundred per cent as far as the policy, I am almost positive. Like all policies, they have to be underwritten by the company. And due to the fact, you see, there was no physical——. Remember I mentioned about the physical? There was no physical. And I got to write all of this to the company and let them know just exactly what happened. So let me get it straight now. She got out of the car?

A. She pulled into the carport there and then she walked back around the car into the—up to the front of the house to the door. And when she come up to the door I was standing at the corner of the house. Well, I just stepped [fol. 955] right around the corner right into the door, see.

"Q. Right in front of her?

A. Uh-huh.

"Q. Now, did you have the——. How was the gun——

"A. It was sticking down this way like that.

"Q. Right inside of your belt?

A. In behind my belt. My shirt was out.

"Q. I see. And she could see it. In other words, the shirt wasn't over it? You had your shirt tucked in?

A. Yes.

"Q. So she saw the gun?

A. Uh-huh.

"Q. Then what happened?

A. Well, she grabbed for it and she got the handle of it and pulled her out, and when she did that I reached and grabbed with both hands, see.

"Q. You grabbed the gun with both hands?

A. Both hands, yes. And somehow or another we knocked it off, see. I don't know how we done it, but anyhow it happened. I don't know.

"Q. Where did the shells hit?

A. I don't know where she hit. I really don't even—— In this area somewheres.

"Q. And then what happened after the gun went off three times?

A. Well, when it went off three times she finally—and she turned loose of the gun and I pushed her that way and she fell.

"Q. And then you had the gun in your hand?

A. And the gun went off two times more.

"Q. Two times more. What did you do after that?

A. I went and got in the car and drove back over here.

"Q. Where did you park the car?

A. Right at the house.

[fol. 956] "Q. Right at the house?

A. Right beside the house.

"Q. God Almighty.

A. I guess you can go down and get the car released. That's as near as I can tell you.

"Q. Then you went home?

A. Yes.

"Q. What time did you get home about?

A. Oh, I would say about somewheres around 3:00 o'clock.

"Q. What's this I heard about the——. I mean, we have to send in the whole headline. They say that they found a gun in your back yard buried. Did you bury it back there?

A. Yes.

"Q. You buried it back there?

A. Yes.

"Q. What did you do with the holster?

A. Put it in the garbage can.

"Q. You put it in the garbage can?

A. The holster, yes.

"Q. I guess you were scared?

A. That's right. Damn sure was scared.

"Q. I'll bet you were Jack. What time did the police arrest you?

A. 4:00 o'clock.

"Q. 4:00 o'clock. About an hour after you got home. Did you go home and just bury the gun right away? I know I read that in the paper about where they got the gun buried in the back yard.

"A. How was the write-up? Pretty bad?

"Q. Not too good. Did you see it?

A. No.

"Q. Keep you pretty well occupied. Keep you pretty well isolated?

A. Yes.

"Q. Well, it is a serious offense. There is no doubt about that, very serious.

A. Yes.

[Vol. 957] "Q. I want to keep this in the files here.

A. Yes.

"Q. Well, that's about all I can do, Jack. When you get your attorney——. I don't know who your attorney is. What was that fellow's name?

A. I was trying to get Madino Cardo (?).

"Q. Madino Cardo?

A. Yes.

"Q. San Jose?

A. Yes.

"Q. There is nothing we can do. About all we can do is put your request to the company regarding your child. And that is Brenda?

A. Gay.

"Q. Brenda Gay?

A. Yes.

"Q. And she was born in Redding. What year was she born in Redding?

"A. I think in '53 or '54. I don't know just exactly.

"Q. How long have you known Marcella?

A. Ever since '53.

"Q. Ever since '53. I'll be darned. Well, that's about all I can do, Jack.

"A. Yes. The kids, they done told them, the girls?

"Q. Yes. Well, boy, I don't know what to say, Jack.

"A. I don't either."

Mr. King: Wait a minute. Is there something else there?

Mr. Grinnell: No. It just goes on to the other tape.

Mr. Mulkey: Do you want to hear it?

Mr. King: Did it say "the other tape" just then?

Mr. Mulkey: No, it didn't say "the other tape". Do [fol. 958] you want to hear it? You heard it once.

(Thereupon the tape recording was turned on.)

Mr. King: There is a conversation there I can't make out, Your Honor.

Mr. Mulkey: Can't your client tell you?

Mr. King: I think that is unfortunate and unfair to say that remark.

Mr. Grinnell: That's Mr. Lazier talking about the front porch.

The Court: There is no need to go further with it.

Mr. Grinnell: Do you still raise your objection about the machine being cut off and on? Because I think it is apparent from listening to it that it wasn't.

Mr. King: If the Court please, on that point, as Your Honor could take judicial notice, these tapes can be cut, can be——

Mr. Mulkey: Just a moment.

Mr. King: Let me finish. You can have the right to——

Mr. Mulkey: You are not raising a valid objection. Anything like that has got to come in by proof, not by your statement.

Mr. King: May I finish and then you have a right to talk?

The Court: Let Mr. King make his objection.

Mr. Mulkey: All right.

[fol. 959] Mr. King: As Your Honor knows, these tapes can be turned on and off and they do not show any pause in the tapes themselves. There is a button on the top of the machine that is being used right now by counsel that starts and stops the tape, and there is no indication whatsoever what may have gone on while the machine was stopped. Now, in that regard, if Your Honor will look at page 43, of what part of the transcription of the tape recording was made and handed to me, you will see, for instance, that the conversation starts off with, "Q. What color house does he have?

A. He has got just a little old cabin.

Q. Is he married?'

A. Yes."

Now, very obviously there was a conversation that went on ahead of whatever was said here. There is no doubt, if Your Honor will read those first paragraphs particularly, that you will see that there was a conversation had either immediately before the tape recording was turned on or at some earlier time. It does not appear here when the conversation first started. Let me go further, if the Court please. Your Honor has heard the tape recording and, as Your Honor knows, there are places in the tape recording where the voices of the people are inaudible, there are statements made that can not be made out, at least by my ears. I couldn't make out what was said and I am sure the court reporter will have several places in his tape where he did not get the conversation as it was recorded because it was inaudible. And I feel that it would be extremely prejudicial to the defendant's case to permit [fol. 960] this tape recording in the condition that it is in.

Mr. Mulkey: Just a moment, Your Honor. May I answer those objections very quickly. The party to that conversation, Mr. Travers, will be in this Court and on this witness stand to explain anything that defense counsel wants to ask him. He was there during the whole thing. He will explain anything that went on. The defense counsel——

Mr. King: The best evidence rule provides that he should be put on the stand and qualified and testify. The words should come from the witness' mouth, not from a tape recording that can't be made out here.

Mr. Mulkey: I am not too familiar with the——

Mr. King: I object on the ground it isn't the best evidence.

Mr. Mulkey: Are you the only one that talks in this courtroom, Mr. King?

The Court: Just a minute, Gentlemen.

Mr King: —would be out of the lips of the witness himself.

The Court: Well, as far as the tape goes and the shape that it is in and so forth it does have its shortcomings. But these are apparent. If you think there is something there that should be developed, Mr. King, you will have the opportunity to do it on cross examination. So the objection on that ground is overruled. I am a little uncertain about the best evidence rule there as applied to tapes.

[fol. 961] Mr. Grinnell: Well, the best evidence rule, Your Honor, usually refers to written documents. If you draw an analogy between that and this situation I am sure that the best evidence rule is usually referred to when you are trying to introduce a copy of a document rather than the original document itself. Here we are attempting to introduce the original conversation rather than have the witness come on and attempt to inform the jury what he recalls of it a month of so later. So with that analogy it would be entirely consistent with the best evidence rule to have the actual voices made at the time rather than have the witness come in and say what he thinks it was a month later.

Mr. Mulkey: I think this is the best evidence, Your Honor.

Mr. King: May I address the Court please.

The Court: If you wait just a minute and let me read this. I don't think the best evidence rule has any application here. Do you have any further objection?

Mr. King: If the Court please, I would like to address myself to the Court on the proposition that as Your Honor was reading the transcribed statement Your Honor will recall that in several instances in the transcribed statement the words as Your Honor heard them from the tape recorder were not the same as in the transcribed statement handed me; that there were numerous places in the record where the conversation was inaudible. Now, further, I want to call Your Honor's attention to this matter: I believe [fol. 962] that if this tape recording is going to be introduced in evidence, as Your Honor has indicated that he may permit its introduction, that I be permitted to make my objection each and every—to each and every one of the matters discussed in the record so that I can have a basis for proper record if it is necessary for this case to go on appeal.

Mr. Grinnell: That is what you are doing right now.

Mr. King: I understand the law to be, if the Court please,—and I spent considerable time going over the law—that I am permitted under the procedure to go through this transcript that I have here in my hand and interpose objections to each and every question that was asked by the insurance agent and answered by the defendant. And I

wish to be permitted for the purpose of protecting the record to do that very thing.

Mr. Mulkey: Well, now, if the Court please, I don't think this is proper, but if it is, if there are going to be objections while this tape is being played, that is all right with me. But as soon as it is finished and the objections are through I am going to play it through again in total without objections.

Mr. King: That wasn't my point at all. You miss my point.

Mr. Grinnell: Why don't you make your objections now so the objectionable part of the tape you have the Court rule *one* it if there are objectionable parts. If it is sus-
[fol. 963] tained, we will then omit those when it is played by merely passing over them.

The Court: If you will give me an opportunity to rule on that, Mr. Grinnell, that is going to be the ruling of the Court. If you have objections as to relevancy, materialfty or other objections to any portion of the tape that was played and has been transcribed you will make your objections at this time.

Mr. King: Very well, Your Honor. Calling your attention to line 3 of page 43 of the——

* * * * * * *

[fol. 964] Mr. King: May I tell my withesses not to be available then at 1:30 because we are going to have quite a——

The Court: We will take a five minute recess and then resume our session in Chambers for the purpose of hearing objections.

(Thereupon a brief recess was taken.)

[fol. 965] Mr. King: May I say this before Your Honor rules, the Court Reporter has indicated to me that their record as it will come out of their office from the transcription of the tape recording just now made here before Your Honor, that the inaudible portions of that tape recording will not show on his record, that there will be no marking whatever of any inaudible portion that he can not understand and take down. Now the purpose of my questioning the Court Reporter would be to establish the fact

that the record on appeal of this case will not show any inaudible parts of the tape recording itself, but will on the contrary be a running account, that will not be a true account of what occurred here.

The Court: You are in error on that point, Mr. King, the tape will have to be admitted in evidence and it can be replayed at any time and anybody can hear what points or what portions are inaudible, what are hard to understand, and it will always be a part of the record and it will be a better part of the record than what the Court Reporter might have in his notes, so the tape will have to be admitted in evidence if it is purposed to be used.

Mr. Grinnell: Yes, Your Honor.

The Court: Now I followed the tape and the transcript and the discrepencies were minor or negligible. There were a few words dropped or sounds that were not reproduced in the transcript but they have no significance and no importance whatsoever. Now if you have objections to the [fol. 966] —any portions of the tape, they should be made at this time.

Mr. King: Very well, starting on Line 3, if the Court please, Page 43 of the transcript of the tape recording heretofore handed me.

The Court: I believe, Mr. King, that it starts on Line 17, is that not right? It was rerun, that was rerun, 3 to 15 is incorporated——

Mr. Mulkey: (Int.) That is correct, Your Honor.

Mr. King: That is not my understanding, Your Honor, my understanding, since I was present at the time I should know about that. The Reporter at Line 15 started in and ran the tape recording starting from the beginning, "What color house does he have" and ran it on down through,— the start of the conversation of the tape started in with, "What color house does he have"—no, it started with an answer, "Down there on the left in the 'Y' " Line 17.

The Court: The transcript is clear, Mr. King, it says the tape was rerun again from the beginning and it starts on Line 17.

Mr. King: Of course, I was present and heard the entire tape when this transaction was made and I saw the Reporter start the tape all over again and he did start it, that particular tape, and it started off, "What color house

does he have'' and that indicates that there was a previous conversation with this insurance agent about this case that is not laid down here on this transcription; and that [fol. 967] gores to one of my objections in this case, that he didn't get all the conversation.

Mr. Mulkey: That objection has been made and overruled, counsel.

Mr. Grinnell: All of the conversation regarding the shooting in Gridley is in this tape and that would be the testimony of Mr. Travers.

The Court: The objection is overruled.

Mr. Grinnell: However, I would be very happy to omit that portion of the tape regarding the color of the house and start where he starts telling where she came home, if that is agreeable with you, we don't want to unduly burden the record with all the other, we would just as soon start where he actually starts testifying about the killing.

Mr. Mulkey: Is that agreeable with you, counsel?

Mr. King: No.

The Court: The tape will be heard in it's entirity, the way I heard it.

Mr. Grinnell: All right, Your Honor.

The Court: And that starts at Line 17, Page 43 of the transcript.

Mr. King: As long as we are forced to start there, when it is played to the jury the first question on Line 17, ''Down there on the left of the 'Y'. You know where the Pickerings live'' and the further question, ''Yes, next to the Pickerings. Ans. Right across in front of them''. I object to that question on the ground it is incompetent, irrelevant and immaterial. There is nothing in this rec- [fol. 968] ord to indicate anything at all about the Pickerings. I feel it would inject something false into the minds of the jurors and on the ground of immateriality it should not be included.

Mr. Grinnell: That is not objection, Your Honor.

The Court: Except this, there are portions of it that, strictly speaking, are not important and are not relevant, however, as part of the entire statement and just to get away from that fact of appearing to break up the tape and play just portions of it, the Court is going to over-

rule the objection and rule that the portion mentioned should be played. In other words it may be immaterial but it is not prejudicial.

Mr. Mulkey: May I ask one thing, at least it appears somewhat evident to me at this point of counsel's position in this affair, I maybe wrong in my assumption but I sort of feel the indication we are going to pick one statement here and one a little later to make it almost impossible to replay the tape leaving out the immaterial parts and I think for the protection of the record if Counsel would make all of his objections so that the Court would know if that is what he is trying to do, then the Court would have ample grounds to overrule counsel's objections.

The Court: Let Mr. King proceed in his own fashion, he has a right to present his objections.

Mr. Mulkey: I think it is just a try to place error in the record is all.

[fol. 969] Mr. King: That is not true at all and I feel I have a proper right to object when I see fit without counsel bickering with me about my objection.

The Court: You will be given full opportunity, Mr. King.

Mr. King: Starting on Line 21, going through Line 28, I object to the question, "What color house does he have? Ans. He has just got a little old two room cabin. Ques. Is he married? Ans. Yes. Ques. What is his wife's name? Ans. Rosey. Ques. I see no reason why the Court wouldn't give it to him. I'll be darn. Ans. I see her sister down here trying to do something about it. Ques. Who is that? Ans. Her sister." Now Line 29. "Ques. Oh, wonderful, what is her sister's name? Ans. Helen." Now I feel that that is incompetent, irrelevant and immaterial, that it is irrelevant because we have never at any time connected up any sister by the name of Helen in this record. I don't know from my reading of the transcript what they were talking about nor do I feel it can be explained and therefore it would be incompetent as well as irrelevant.

The Court: It is the Court's conclusion there is nothing that has to be explained about it, that it is not prejudicial and therefore it can be played as part of the tape.

Mr. King: Line 29, "Ques. Oh, wonderful. What is

her sister's name? Ans. Helen. Ques. That is Marcella? Ans. Yes. Ques. And her last name is what? Ans. I forgot what her last name is. Anyhow she didn't want to have the kids with them down there or no say-so over there. I was suppose- to have the say-so over the money". [fol. 970] I object if the Court please, to the questions and answers last read on the ground there are incompetent, irrelevant and immaterial, that there is no proper foundation laid about, "money" in this case, that it would be prejudicial to the defendant to have the matter of money brought in at this time.

The Court: There appears to be nothing prejudicial about the statement. The objection will be overruled.

Mr. King: Then starting on Line 3, Page 44 of my transcript, "Ques. Of the life insurance? Ans. Yes." I object on the ground that that is incompetent, irrelevant and immaterial, that it is highly prejudicial to the defendant's rights, that there has been nothing mentioned in this entire trial about life insurance or who the policy might have been made out to or whose life was covered with the life insurance, that it injects into the case an element that would be difficult for the defendant to answer, that it might give the jury some idea that——

Mr. Mulkey: (Int.) Perhaps——

Mr. King: (Int.) Just a moment, Mr. Mulkey, let me finish and then you can talk.

Mr. Mulkey: I doubt it.

Mr. King: Give the jury some idea of some motive on the part of the defendant which does not appear in this case.

Mr. Mulkey: If the Court please, I will be happy if there is any question about that. It is my understanding that the question referred to is insurance on the life of the [fol. 971] deceased, payable to her children, and I am sure the insurance agent will be amply able to explain that to the jury.

The Court: This goes to the purposes of the conversation.

Mr. Mulkey: That is right.

The Court: Between the witness and the defendant?

Mr. Mulkey: That is right.

The Court: The objection will be overruled.

Mr. King: Your Honor, I have a call from my wife about arranging witnesses, may I be excused?

(At this time a short recess was had, after which the following proceding were then had:)

Mr. King: May Your Honor rule that the objections that I interposed—perhaps this will expedite the matter—will Your Honor rule that when the questions are read and the answers are read if I say the previous objection, that it will incorporate my objection on the grounds it is incompetent, irrelevant and immaterial and then I will not have to repeat that each time that I raise the point on these questions.

Mr. Grinnell: Just same the same objection.

The Court: It will be so understood.

Mr. King: On Line 4, Page 44, "That's still in the underwriting department, Jack, that money, and you have the binder. Now, you have got the binder that was given Marcella. Ans. No, she had it in her billfold. Ques. But it is in her personal affects now? Ans. Yes. Ques. Fine. Ans. You will have to go over to the morgue. Ques. I can [fol. 972] get that over at Gridley. Ans. Yes. And they can't touch it". Now my general objection that, I understand that my general objection that I have heretofore made goes to this statement I have last read to Your Honor.

The Court: The objection is overruled.

Mr. King: And I also at this time will move to strike the testimony that I have read to this point.

The Court: The motion is denied.

Mr. King: Line 18, Page 44, "Ques. —" Line 11, "I got the Sheriff's office—been very nice. They are going to have photostatic copies made of the marriage license. That is very important, Jack, that you were married. Ans. Yes. Ques. It is a terrible thing, isn't it? Ans. Yes. She lied about it all the way around. Ques. Terrible thing. Ans. Yes, she through we wasn't married". Your Honor, I object on the previous grounds as through they were fully set forth at this time and further call Your Honor's attention to the fact that the replaying of the tape recording shows that the word, "They" instead of, "She" in the answer is the correct word, " 'That they thought' we

wasn't married", was the correct answer as came out of the tape recording.

The Court: Well, the jury is going to hear the tape and not the transcript so the objection is overruled.

Mr. King: And the same objection to the next question on Line 18, "She thought you weren't married. Ans. Yes. What I can't understand is what the hell she told Goldfine [fol. 973] about it. Ques. I don't know. Darnest thing I ever heard. Can't understand it. Ans. At the Welfare Department she told them she wasn't married. Ques. I'll be darned. Ans. Yes, sir." I objection on the same grounds, if the Court please, to those statements, particularly that they are, I don't mean irrelevant, but immaterial.

The Court: They are incidental to the conversation and can not be deleted from the tape without destroying it's usefulness. The objection is overruled.

Mr. King:

Q. Line 20, "I don't know. Darn-est thing I ever heard. Can't understand it. Ans. At the Welfare Department she told them she wasn't married." My usual objections, and that the answer be stricken as not responsive to the question.

The Court: The objection is overruled and the motion is denied.

Mr. King:

"Ques. I'll be darned. Ans. Yes, sir. Ques. Can't understand it. Goofiest thing. This is really something. See, we are interested to really how the darn—I mean, how it come about, you know, like you were telling me this morning, and I have got to write a letter to that—— Ans. I tell you what to do. I want you to go over there where she lives, see". Now if the Court please, I interpose my objections to that statement under my general objections and also that the conversation that they had in the morning is not a part of this record and it is very evident from [fol. 974] that statement that there was a conversation had in the morning with this same insurance agent by the defendant which isn't produced here.

The Court: There is nothing prejudicial about the fact

they may have had other conversations. The objection is overruled.

Mr. King: "In Gridley. Ans. Yes"—that is starting on Line 29, Page 44—"And go to the corner of the house there right next to the front door. And she was standing" there are three dots or dashes in my transcript and it starts again, "She come right up to the door and I stepped out behind the corner right in her face and" and there are several more dashes indicating from what I heard on the tape recording that there was considerable inaudible conversation had where the dashes occurred, there were quite a number of sentences there, words made by the defendant at that time, if my memory serves me correctly, on the tape recording, that may have been very material to this case and those inaudible statements are not truely transcribed here on this record, or in the record that was taken here this morning. For that reason I object to the statement going to the jury on the ground it is incompetent, irrelevant and immaterial, and that first, on it's inaudibility, and primarily on that ground.

The Court: Mr. King, this statement is not going to the jury. The tape is going to be played to them and the fact that there may be words or even phrases that are inaudible or which are not understandable, does not disqualify the tape.

[fol. 975] Mr. King: Starting on Page 45, Line 1. "Say that again. Let me"—and then there is four dashes. "Ans. Standing right at the corner". May I again call Your Honor's attention to the fact that there was considerable, that there was a considerable statement right at that point in the tape recording that was inaudible, that hasn't been transcribed, that will not be able to be understood by the jury and that it is very material to the defendant's case just where he was standing when he first saw the decedent and that it would be highly improper to introduce that statement for whatever it is worth when it might have some very definite significance in the trial of this cause. I object on that ground.

The Court: There can hardly be any better proof, Mr. King, of what the defendant said than the tape, as his actual statements. If he said something of consequences that was not picked up on the tape, why Mr. Travers will

be there and you will be entitled to cross examine him. There doesn't appear to me there is any such thing at that point. The objection is overruled.

Mr. King: Going on, Your Honor, Line 3, "Ques. You were standing at the corner of the house? Ans. Yes, where she goes into the door, and she comes up to the door and I just stepped around the corner and right into her face". I object on the general ground I have heretofore made to the previous questions in this transcript and on the further ground that the nature of the statement shows that it is not an admission but a confession and that the rules [fol. 976] concerning confessions be applied, that there is no proper foundation laid, that there is nothing to show that this statement was given freely and voluntarily.

Mr. Grinnell: Of course if that foundation isn't laid when Mr. Travers is on the stand, the tape of course won't be admitted.

Mr. Mulkey: Did Mr. King say that was a confession of murder—Do I understand you correctly, counsel?

Mr. King: It might be construed as such.

Mr. Mulkey: Do you construe it as such?

Mr. King: That I am not prepared to answer at this time.

Mr. Mulkey: You are making your objection on that ground, I would like to know, do you construe it to be a confession or not?

Mr. King: I will leave it up to the Court.

The Court: The objection is overruled.

Mr. King:

Question, Line 6, "I won't write none of this down. I can remember. I don't want nothing on paper. Ans. And you will find that out. And she said"—and then there are several dashes on the transcript copy that I have in my hand which shows that the remainder of the conversation had at that time with the decedent is inaudible and that that particular conversation had at the time with the decedent is very material to the issues in this case and it would be extremely misleading to the jury not to be able find out at this stage of the proceedings what was [fol. 977] said by the decedent. As Your Honor will remember there was quite a garbled dissertation had on

the record, on the tape, which was not audible and it is very material to the case, to the defendant's side of the case at least, that what was said at that moment is very important and for that reason I raise my general objection to the question and request that the—since it isn't audible that the remainder of the question and answer be stricken.

The Court: The objection is overruled.

Mr. King: Now starting on Line 9, "Ques. Tell me something. She lunges. What did she do", the answer appears after a replay, a repeating of the record on Line 21, "You will find that out. She said," and then again there is an inaudible part of the record which was not taken down by the Reporter at the time when he made the record I have before me; and it is extrelely important that the conversation of the decedent be transcribed, if it is to be introduced to the jury, that the inaudibility prejudices the defendant's case and for that reason the question and answer should be stricken.

The Court: The objection is overruled.

Mr. King?

"Ques. Tell me something"—Line 22—"She lunged. What did she do? When she walked up the walk what exactly did she do? Ans. She walked up to the walk and go up to the door and she took her keys out and I don't believe she had her keys already out and started to reach for the door when I stepped around the corner. And when I stepped around the corner she seen the gun handle [fol. 978] sticking out and she reached and grabbed it". Now I object on my previous grounds and further that this statement is in the nature of a confession and that there is nothing to show in this record at this time that the confession was free and voluntary.

The Court: The objection is overruled.

Mr. King: Question on Line 29, "Where was the gun actually at, Jack? Ans. Right in my belt. Ques. Right in your belt? Ans. Yes." Now I move that on my general objection, that it is incompetent, irrelevant and immaterial, that it is a—it goes further than an admission and is in the form of a confession and there is nothing to show it was freely and voluntarily given.

Mr. Mulkey: You say it does then amount to a confession in your estimation, Mr. King?

Mr. King: Line 32, "Then she made"—and there are several dashes in my transcript which show that the rest of the question was inaudible, and if my memory serves me the record played to Your Honor was inaudible at that point to some extent and then the question goes on "Go ahead. Ans. She made a lunge for it and got it, see. Ques. Did she get it out of your belt? Ans. Yes, she got it plum out. That's what I was wrestling for, was the gun. Ques. For God's sake".—And then my objection heretofore made—there was an answer came in there, "Ans. But I" and then there are several dashes showing the Court Reporter did not hear the inaudible conversation that was had on [fol. 979] the tape recording. Now I move, I object to that on my general grounds both to the questions heretofore read and the answers thereto and on the ground that they are not only incompetent, irrelevant and immaterial but they are highly prejudicial to the defendant.

The Court: The objection is overruled.

Mr. King: I move at this time to strike the same.

The Court: The motion is denied.

Mr. King: Now evidently the Court Reporter in this transcript had some difficulty, he repeated four times, the tape, to try to ascertain the inaudible portions and it is at this point where most of the inaudible portions occur. There is considerable tape that runs at this point of the statement that only a word now and then can be distinguished and the Court Reporter got down question, "For God's sake" and then an answer, "But I" and then he got down, "But I ain't going" and then, "Wrestling for, is the gun. But I ain't going to" and then a lot more inaudible conversation and then there was an answer, "But I ain't going to ever" and then a lot more inaudible part of the conversation and I object to the introduction of those statements to the jury as incompetent, irrelevant and immaterial, highly prejudicial to the defendant's case, that they would serve only one purpose and that would be to confuse the jury and to let them substitute in the inaudible part of the record anything that they might want to hear, from something that can't be made out by at least the Court Reporter and those people who heard it here

[fol. 980] today. I move that further that that part of the conversation——

Mr. Mulkey: (Int.) Mr. King does not speak for the District Attorney's office, that that be stricken from the the record.

The Court: This transcript is not going to be presented to the jury and the tape speaks for itself and I assume if a juror doesn't hear something why he knows he hasn't heard something, so the objection is overruled and the motion is denied.

Mr. King:

Question, Line 15, "Then what happened after she grabbed the gun out of your belt? Ans. When she grabbed the gun out of my belt I grabbed for it, see, and got ahold of the gun, and I bent it back, bent her arm back." I again renew my objection and ask that the question and answer be stricken and not played to the jury, as a declaration made in the nature of a confession, there is no foundation laid, that it would be extremely prejudicial to the defendant's case if this tape recording with that statement in it was played to the jury.

The Court: The objection is overruled.

Mr. King: Question, "Towards"—Line 18, "Towards her again. Ans. Yes. And it went off three times. Ques. Three times? Ans. Three times. And then when I pushed her by the shoulder her arm came around and I guess when I pushed her I pulled that son-of-a-bitch two more times". Now my general objection that I have heretofore made, to that please, Your Honor. Also on the further ground that it is going further than an admission in that it is [fol. 981] a confession, that it was not freely and voluntarily given, in contravention to the law in this case. I move it be stricken from the record and not played in the record to the jury.

The Court: The point that it is a confession is the first time that has come up notoriously.

Mr. Mulkey: I have asked Mr. King——

Mr. King: (Int.) Would you let His Honor finish so that I can hear what His Honor has to say?

Mr. Grinnell: The only difference I believe, would be in the foundation that has to be laid, I will just ask the

gentleman if he made any threats to the man or any promises of immunity, if he did not, the statement was voluntary.

The Court: It may approach the point of a confession.

Mr. Mulkey: I understand Mr. King believes it to be such and we will lay that foundation as long as that is Mr. King's position, that is your position, is it not, Mr. King?

Mr. King: I don't like to be harassed if the Court please, by Mr. Mulkey, if he has anything to direct to me, would he please direct it through the Court?

Mr. Mulkey: Yes, I would like to know if you are making the objection on the ground it is a confession or not.

The Court: He has the right to make the objection and he has made it, Mr. Mulkey.

Mr. Mulkey: Fine, that is all I wanted to know.

The Court: And the Court feels there may be some basis [fol. 982] for it and this may approach the nature of a confession and that therefore before the tape is used I think that the same foundation should be laid as is used for the introduction of a confession.

Mr. Grinnell: We will, Your Honor.

The Court: So that the objection is overruled.

Mr. King: Line 23, question, "In other words you had the gun in your hand then? Ans. Yes. Ques. Well, I'll be darned". Now I object to that on the grounds heretofore mentioned and on the further grounds it is in the nature of a confession and that it was not freely and voluntarily given, and that statement coupled with other statements in this record would amount to a confession and for that reason I move that it be stricken and not played to the jury.

The Court: The objection is overruled and the motion denied.

Mr. King: May I interpose an objection to, further, on Line 28 where the word, "Son-of-a-bitch" is used, would Your Honor consider that in ruling on the previous objection heretofore made, that the language is offensive to the senses, that it puts the defendant in a bad light, that he has not nor does he intend to use that type of language before the jury. That it brings into the case an element of rowdism or something of that sort that shouldn't be

before the jury, that this was a private conversation between him and an insurance broker, that he did not know that it was being transcribed and it would very seriously prejudice the defendant's case if those words were used [fol. 983] before the jury.

The Court: The objection is overruled.

Mr. King:

Question, Line 32, Page 46, question, "Three times. Ans. Three times. And then when I pushed her by the shoulder her arm came around and I guess when I pushed her I pulled that son-of-a-bitch about two more times". I object to that if the Court please, and move it be stricken on the previous grounds set forth and in particular on the ground of the offensive language used, which would cause the jury to feel that this defendant is of a rough or uncouth character that would use language of that sort before the jury.

The Court: The objection is overruled.

Mr. King:

Question on Line 3, "In other words, you had the gun in your hand then? Ans. Yes." The other objections, if you please, will be taken to this question and answer and I ask that it be stricken and in particular on the ground that it is a confession and no proper foundation has been laid and there is nothing to show that it was free and voluntarily given.

The Court: The objection is overruled and the motion denied.

Mr. King:

Question, Line 5, "Well, I'll be darned. And then it went off twice more. Five times. Then she fell right there, didn't she? That's too bad because I am going to have to write this up and send it in to the company. Ans. That's the way it happened, so I can't do nothing about it." Now my previous objections to that, if the Court please, and further that the statement by the insurance [fol. 984] broker, and all through this transcript I have seen indications of the statement that he intended some-

thing of value to go to the defendant if he did give him a statement, even though he said that he would not write it up, he promised something in the way of immunity at this point and there was a consideration moving from the accused to the insurance agent when he made the statement. I felt, if the Court please, as is clearly indicated from the entire transcript which Your Honor heard and read, that the insurance broker was in there for the purposes of getting a secret statement from the accused. Now he did not divulge to the accused that it was being taken down, and it is very apparent from this transcript, from the way the questions were asked that the agent did know that it was being taken down by the tape recording, and that the defendant did not know and he felt that he was doing something that he had to do, to wit, make a declaration to an insurance broker concerning an insurance policy which the broker or agent had sold him. I feel there was some promise implied at least of immunity at this point.

Mr. Mulkey: Of immunity from what, Mr. King. I think it is a fair question, Your Honor, there are certain prerequisites with respect to any promise made and the objection as made now holds no ground at all. Promise of immunity from what, prosecution.

The Court: It doesn't appear from this tape and that is all I have before me, so the objection is overruled.

Mr. King: And my motion to strike?

The Court: Denied.

[fol. 985] Mr. King: Line 10, "There is one point I should put in there too. Jack; what did you have the gun for in the first place? Ans. Well, I didn't have it. I went over there, see, I didn't have it when I first went over there. And so"—there are several dots indicating that the tape is inaudible at this point, and as I recall there were several sentences expressed on the tape that could not be made out. Going on, "I went back and got it and put it in my belt". I object first of all on the general grounds which I have heretofore specified and further I request that the question and answer be stricken and not played to the jury in the tape recording.

The Court: The objection is overruled and the motion is denied.

Mr. King:

Question on Line 15, going on, "Where did you find the gun? Where was the gun? Ans. The gun that I had? Ques. Yes, the gun that you had in your belt, did you bring the gun over with you? Ans. Yes." Now I object on the grounds heretofore suggested, Your Honor, and move to have the question and answer stricken and on the further grounds that this is in the nature of a confession and not an admission and even though it were an admission, that it is highly prejudicial to the defendant's case and it should be stricken.

Mr. Grinnell: May I say something at this time? Instead of taking this transcript line by line, would it not be in order to have Mr. King make that objection to the entire tape, that it is in the nature of a confession and we can have a ruling on that at this time and then we will, [fol. 986] as we have indicated earlier, lay the foundation for the introduction of a confession, whether it is so construed by the Court to be a confession or an admission.

The Court: I think we can save time on some of these points and I will do this, that it is the Court's conclusion that the tape recording in some portions where it gives statements made by the defendant, either approaches or actually constitutes a confession of some offense, and it is the Court's ruling that before the tape is used in it's entirety, and I understand it is going to be used in it's entirety.

Mr. Mulkey: Yes, Your Honor.

The Court: That a proper foundation will have to be laid.

Mr. Grinnell: Very well.

The Court: So any objections made on the ground that some of the answers or questions and answers amount to a confession are overruled. Now objections that are made on the ground that parts of the tape are inaudible are overruled because it does not appear that anything that is difficult to hear is prejudicial to the defendant in this case, the thing that counsel has referred to as the transcript here, and the tape of course will speak for itself and——

Mr. Grinnell: (Int.) And if there is inaudible portions

certainly Mr. King can go into that on cross examination of Mr. Travers if he wishes.

[fol. 987] The Court: And it is the Court's attitude or position if a juror does not hear anything he just doesn't hear anything and he certainly will not imagine something. There is a presumption of innocence that goes with the defendant in this case.

Mr. King: At this point, Your Honor, may I suggest that it seems rather unusual that these omissions or inaudible portions of the tape recording occur at a time usually where the defendant is trying to answer the agent on very material points concerning the shooting.

Mr. Grinnell: On the other hand I think the tape indicates that all of the questions are directed to clarify the circumstances surrounding the shooting and to clear up any——

The Court: (Int.) I don't agree with Mr. King on that point, the points where the tape is difficult to hear or inaudible are of very little meaning or significance and the portions that are important are quite clear so any objection based on the fact that some of the portions or words are inaudible will be overruled.

Mr. King: Now do I understand that Your Honor wishes, does not wish me to go on at this time making my objections to the various questions and answers?

The Court: I don't want you to repeat, it will be unnecessary for you to repeat the objections that I have already ruled on.

Mr. Mulkey: As to audibility and confession.

The Court: Now the third objection I will rule on, that [fol. 988] it is a fact there is in the tape and in the conversation contained in the tape some matters that are irrelevant and immaterial, but they are not prejudicial and to take them out would destroy the usefulness of the tape because we would have to be turning it on and turning it off and then the jury would get the wrong impression as to what is happening. The immaterial and irrelevant portions are not prejudicial to the defendant in any respect whatsoever so that the Court will not entertain an objection on that ground.

Mr. King: May it be considered, since Your Honor has gone over this transcript we are now talking about, which

was a transcript of the recording heretofore heard by Your Honor, that my objection goes to each and every question that goes on in the tape here; and Your Honor's ruling would be the same on each and every objection, the same as if I had made those objections in full?

The Court: That is correct.

Mr. King: And that my motion to strike would be interposed to each and every question and answer if we were to continue the proceedings as we have heretofore had it?

The Court: That is right and the motions are being denied.

Mr. King: Your Honor, for the edification of the Court at this time I wish to inform the Court I have spent considerable time reading cases involving tape recordings and if this tape is permitted in the record, I feel that it would be error of such character that it would cause a re- [fol. 989] versal, if it results in a conviction of the defendant.

Mr. Grinnell: Do you have any case that you can cite where a tape was used that it was reversed on that ground——

Mr. King: (Int.) Just a moment, let me finish. That while the Courts have gone to some length to uphold tape recordings which were taken out of the presence of the accused, but that these tape recordings only were taken by officers and not by a person who is an intimate of the accused, and may the record show this person who is doing the questioning was an intimate and a long time acquaintance of the accused, he was in a relationship of insurance agent or broker and client and while I quite agree with your, Your Honor, there is no relationship of attorney and client or relationship of patient and doctor or priest and confessor, that this approaches a confidential communication between a man and his insurance broker, for a very definite purpose, and that to permit the children to receive money that might be due them. I do not feel, Your Honor, that the Supreme Court of this State would go so far as to admit this declaration, this tape recording in the fashion that the District Attorney wishes to present it to the jury. I feel that it is gross error to admit the tape recording, that it will be highly prejudicial to the defendant and that it would serve no purpose other than

to excite the prejudice and passion of the jury, to inflame them as against this defendant, and the evidence could be well brought before the jury without the tape recording, it could come out of the mouth of the agent and be produced [fols. 990-995] in question and answer form before the jury. I feel very strongly on this point, Your Honor and for that reason I made the statement I have just made.

The Court: The points may be argued in argument, argued as to the weight of the testimony, but they don't go to admissibility.

DISCUSSION RE ADMISSIBILITY OF TAPE RECORDING

Mr. Mulkey: May I make one other statement that occurred in the beginning of this proceedings, so that I might forestall any undue delay before the jury. Mr. King made the statement about the attorney's room bugged or something of that kind, and I want at this time that Mr. King be admonished not to make statements of that kind before the jury because I am sure he has no proof of them and I don't think that is proper to put before a jury in a remark.

The Court: Of course it is not.

Mr. King: If the Court please, on that very point, I did not cross examine Officer Spann, may I be permitted at the resumption of this trial to ask Officer Spann a very few questions?

Mr. Mulkey: You can call him as your witness any time you want.

. . . . . .

[fol. 996] RAY J. TRAVERS, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Mulkey:

Q. Will you give your name please?

A. Ray J. Travers.

Q. Mr. Travers, where do you live?

A. Route 3, Box 4954, Oroville. That is on the old Quincy road.

Q. What is your business or occupation?

A. I am an insurance agent in the town of Oroville.

Q. Do you know the defendant here, Jack Atchley?

A. Yes, I do.

Q. Were you summoned to see him at the Oroville county jail on or about the 4th or 5th of August of this year?

[fol. 997] A. I believe it was on the 5th of August, yes.

Q. You saw him on the 5th?

A. I did.

Q. When were you called to see him?

A. Well, it was the previous day at 6:00 o'clock in the evening if I recall, and Vernon called me on the phone and asked me to come to the jail the next day.

Q. So pursuant to that request by the defendant you went to the jail the next day, is that right?

A. I did.

Q. And you had a conversation there at the jail with him, did you not?

A. I did.

Q. And that was in the morning?

A. It was approximately 10:00 o'clock.

Q. After that conversation did you report that conversation to anybody in the sheriff's office?

A. Yes. After I finished talking with Jack—Vernon I have always called him—and I stopped by and saw the Undersheriff Mr. Spann, I believe is his name, and he asked me if Jack had said anything and I said yes, and Jack had told me what had happened on the morning I believe of the death of Marcella.

Q. Were you asked then if he would mind if that could be recorded?

A. Yes, I was.

Q. Did you then at about noon on Tuesday the 5th go back into the interrogation room and talk with Mr. Atchley?

A. Yes, I did. I had to have further information from my company also.

Q. At that time——. This was after you had the sheriff—[fol. 998] the sheriff had said—or the undersheriff had asked you whether you minded if that conversation be recorded, is that right?

A. That's right.

Q. You have just been in our office downstairs and had

occasion to listen to this tape. Is that a tape recording of your conversation with the defendant at that time and place?

A. It is, yes.

Q. Did you offer any threat to Mr. Atchley to get him to talk to you about these things that are contained on this spool?

A. Absolutely not.

Q. Did you offer him any inducement or anything to get him to talk to you?

A. No, I did not.

Q. You in fact indicated to him that this would have to be reported to your company as far as whatever information he gave you, did you not?

A. Oh, yes, absolutely.

Q. So he understood that when he was talking with you?

A. Oh, yes.

Q. And he called you with reference to a policy on his wife's life of which the beneficiaries were the children?

Mr. King: Just a moment now, if the Court please. I object on the grounds that the question is leading and suggestive. I have no objection to the witness testifying but——.

Mr. Mulkey:

Q. What did he call you——.

Mr. King: I don't want Mr. Mulkey to testify.

The Witness: Well, mostly——.

[fol. 999] Mr. King: And I move that the answer be stricken and start over again.

Mr. Mulkey: There wasn't any answer, Mr. King.

Mr. King: I heard an answer.

Mr. Mulkey: Did you?

The Court: If there is any answer it is stricken.

Mr. Mulkey:

Q. What did he call you about when he asked you to come down?

A. Well, more specifically Jack wanted me to bring him some cigarettes, and when I went down to the jail the

next day he wanted me to bring him some cigarettes and also wanted to talk about the policy.

Q. What policy?

A. That was the life insurance policy written on Mrs. Atchley.

Q. He was no beneficiary under that policy?

A. Absolutely not. He had no power whatsoever as far as the policy is concerned.

Q. That policy was actually taken out by Mrs. Atchley?

A. By Mrs. Atchley, and the children were the beneficiaries and Jack was the final beneficiary.

Q. And this was taken on Tuesday the 5th of August at about noon, is that right?

A. Right. I mean, I hadn't been informed they were going to take a tape recording and I surmised as much but I didn't know they had taken it. And it 10 or 15 minutes after 12:00 when I actually knew a tape recording had been taken.

Q. But the statement was on that date and about that time?

[fol. 1000] A. Yes, it was.

Q. And this statement was free and voluntary to you as far as Mr. Atchley was concerned?

A. Oh, yes, absolutely.

Mr. King: I object to it on the grounds it calls for the opinion and conclusion of the witness and ask that the answer be stricken.

Mr. Mulkey: I think this witness can observe whether he made any threats or promises. I think it is a fair statement to be made, Your Honor. He would certainly know whether any coercion was put on the man.

The Court: I think, Mr. Mulkey, it should be presented in a different way than that. That is an opinion and conclusion in connection with this matter.

Mr. Mulkey:

Q. You made no threats or promises to this man to this man to get him to make this statement to you, did you?

Mr. King: Again I object, if the Court please, that the question is leading and suggestive and move that the answer of the witness be stricken.

The Court: Did the witness answer?
The Reporter: No.
Mr. King: I saw the witness answer.
The Witness: I shook my head.
The Court: The answer is stricken. The question was leading.

Mr. Mulkey:

Q. Did you offer this man anything to get him to talk [fol. 1001] to you?
A. No, except I did bring him some cigarettes that morning.
Q. Which he had asked you to bring to him?
A. That's right.
Q. Did you threaten him to get him to talk to you?
A. No, I did not.

Mr. Mulkey: That is all. I now offer this tape into evidence, Your Honor.
Mr. King: Just a moment, if the Court please. May I cross examine the witness before you start playing your record?
Mr. Mulkey: Only as to the preliminary portions, Counsel.
The Court: You may cross-examine.
Mr. King: Thank you, Your Honor.

Cross-examination.

By Mr. King:

Q. Mr. Travers, you have known Jack for quite a long time, haven't you?
A. Approximately one year, yes, sir.
Q. You knew his wife, did you?
A. Yes, I did.
Q. Were you friendly with Jack?
A. Oh, yes.
Q. He had been to see you, had he not, on numerous occasions about insurance?
A. Yes, he had.
Q. And you were his insurance agent?
A. That's right, I was.

[fol. 1002] Q. And you did have a rather confidential relationship with him then, did you not?

A. Yes, I did.

Mr. Mulkey: I object to the question. It calls for the opinion and conclusion of the witness.

The Court: The objection will be sustained.

Mr. King: Very well.

Q. Now, going into the nature of your relationship with Jack, he would call at your office, would he not?

A. That's right.

Q. And you would discuss various insurance problems with him, would you not?

A. That's right.

Q. Were you aware, Mr. Travers, that your client Jack couldn't read nor write?

A. Well, he signed his name. I was not aware that he could not read or write, but I knew he could sign his name.

Q. Did you ever offer him anything to read such as a policy or anything of that sort?

Mr. Mulkey: If the Court please, I fail to see whether the defendant could read or write bears on the voluntariness of the statement, which is the only thing in issue at this point.

Mr. King: Well, now, if the Court please, I think that this witness will testify from what I have heard here—and I have not talked to you, have I?

A. No, Mr. King.

Q. This is the first time?

A. This is the first time, yes, sir.

[fol. 1003] Mr. King: First time that the witness was writing things on a pad or on a paper at the time that he interrogated Jack in the counsel room of the local jail.

Q. That's right, isn't it?

A. That's right, yes.

Q. And did you——.

Mr. Mulkey: I am going to object to——

Mr. King: Now——.

Mr. Mulkey: Just a moment. I have an objection and I would like to get a ruling from the Court. Whether the man could read or write or whether this man made any

writings himself has no bearing on the inquiry before the Court now, which is the voluntariness of this statement.

The Court: Well, I don't see it, Mr. King. How does it relate to their discussion under this date?

Mr. King: As Your Honor will recall, when we heard this tape recording there was a remark and several remarks made by this witness about "Now, I don't want to write this part of it down but I will have to send in this part to the company" and so on. Now, I wanted to find out from the witness just what he wrote down and what he sent to the company if anything.

Mr. Mulkey: I think that has no bearing on the free or voluntariness of this statement, Your Honor, and I submit that objection.

Mr. King: If the Court please, he went into the matter on direct examination about this very, very thing, and [fol. 1004] I think I have a proper right to cross examine him on that, on his statement that he did go there to the jail and that he did have a conversation with Jack and that certain things were written down. I just want to know if Jack knew what was written down.

The Court: The objection will be overruled. You may proceed.

Mr. King:

Q. Will you please answer the question?

A. Yes. I took notes regarding the children. I was writing down the ages of the children more specifically was what I wrote down.

Q. And how many children were there?

A. I think there was five altogether.

Q. Do you recall their ages?

A. Offhand I can not. I think the oldest girl was 15, and then right on down the line to about three years old.

Mr. Mulkey: If the Court please, I am going to object to this proceeding. Mr. King will have opportunity to cross examine this man at his leisure after the introduction of this statement, but his examination at this point is limited solely to whether this statement was free and voluntary or not. After the statement is played he can examine and cross examine this man as much as he likes. What the ages of the children were would have no bearing on the voluntariness of the statement.

Mr. King: May I say that what I intend to show here, [fol. 1005] Your Honor, so perhaps Mr. Mulkey will not have to object, I wanted to elicit from the witness information concerning Brenda, the youngest child, the subject matter of a policy that was testified about. Now, it is very material to the defendant's case that it be shown by this witness—and I am sure it can be—that Jack did say that Brenda was his child.

The Witness: That's right.

Mr. King: And that if that is a fact then there might have been some inducement, Your Honor, to qualify this statement that will be played here, I take it, to show whether or not it was given freely and voluntarily. That is the purpose of my asking about that child.

The Court: Well, that is not an inducement which would render inadmissible a recording of the statement, Mr. King, so the objection is sustained.

Mr. King: Very well.

Q. Now, you did discuss the policy of insurance?

A. Oh, yes.

Q. With him. And as you have said you made a list of the children?

A. That's right.

Q. Would you tell me about that policy? What kind of a policy was it?

A. As I recall it was a whole life policy.

Q. On the life of the decedent?

A. That's right.

Q. Katherine Marcella?

A. That's right.

Q. Ferris. Now, did you write that policy in the name of Ferris or Atchley?

A. Atchley.

[fol. 1006] Q. Now, going back to these conversations and dropping that matter for a moment, you did have, as I understand you to say—and you correct me if I am wrong—you did have two or three conversations with him? Did you have two conversations prior to the tape recording or just one conversation prior to the time this tape recording was made?

A. I don't quite understand your question. You mean on the 5th?

Q. On the 4th or 5th. Did I understand you to say you went there the afternoon of the 4th and had a conversation with him?

A. No. That was a telephone call that evening at my residence. Jack called me that evening.

Q. Then you only had one conversation prior to the conversation that was tape recorded, is that so?

A. On the 5th, yes.

Q. And that conversation was had in the morning of that day?

A. Approximately 10:00 o'clock.

Q. And it was about an hour in duration, was it?

A. That I can't recall.

Q. Would that be a good approximation?

A. A good approximation, yes.

Q. It might have been longer than that?

A. Well, it might have been shorter. Most likely shorter.

Q. But it was in the neighborhood of an hour you think?

A. I couldn't say for sure.

Q. At that conversation did you discuss the matter of the policy?

A. Yes, we did. It is the same general type of questions and answers that were discussed on the second [fol. 1007] meeting.

Q. Now, when you came down to the jail did you converse before you walked in to see Atchley in the lawyer's conference room—and I take it that is where your conversation was had, in the box down there——.

A. The glass——.

Q. —where the glass is on the windows?

A. Yes, I believe that's it. There was glass there.

Q. I will refer to that as where we lawyers confer with our clients, lawyers' conference room.

A. Yes.

Q. Did you have a conversation with any of the officers prior to the time you went back and Jack was unlocked and brought around—is that true?

A. That's right, I did.

Q. And what officer did you talk with?

A. I don't know them too well. The jailer was one and I was then taken into the undersheriff's office.

Q. That is Officer Spann?

A. Right. And my one question to them was, naturally, if I could see Mr. Atchley, and they said yes. And then my other question was to them if I could bring him cigarettes, and they said no, that they had a commissary downstairs and that they would not allow it.

Q. At that time they didn't ask you to interrogate him on the shooting, did they?

A. No, sir, absolutely not.

Q. But as I understood you on direct examination you did interrogate him and asked him questions concerning the shooting?

A. The second time, yes.

Q. Did you mention it at all the first time?

[fol. 1008] A. No. Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time.

Q. And you sat there and listened to the whole story?

A. That's right.

Q. Now, was that story that he told you first substantially the same as you heard played down in the District Attorney's office the second time?

A. Yes, it was.

Q. Did you make notes of that conversation?

A. The second time?

Q. Yes.

A. Just on the children only, just the ages of the children because I had the names of the children but not on the application, and that application is on file in Berkeley, California.

Q. What company by the way?

A. State Farm Insurance, life insurance company.

Q. When you first questioned him did you have occasion to make any writing at all?

A. No, I did not.

Q. But on the second time you tell us then that all you made notes of was just the ages—did you say the birth dates of the children?

A. That's right.

Q. And you made no other memoranda?

A. No, I didn't. I take that back. I want to withdraw the first question. I did take one note, and that was—— No. That was the second time. It wasn't the first time. [fol. 1009] And that was another note I took, was the address of Jack's brother and his sister because he wanted me to contact his brother and sister regarding his baby and wanted me to have them come down to the sheriff's office and take custody of the child.

Q. That was Brenda?

A. That was Brenda, his baby, yes.

Q. The girl that you first mentioned?

A. Yes.

Q. One of the five children of Mrs. Atchley?

A. Yes.

Q. Isn't it true that when you first talked to him you told that you had to have certain information for the purposes of your company?

A. Not when I first went in, no. As I recall I went in to see Jack that day on Jack's request also, and I brought in the cigarettes.

Q. Is this the first time you are talking about?

A. This is the first time. That is in the morning. And Jack told me about this and he just brought the incident up. I was going to ask him about it but he brought it up first when we were sitting there and he told me exactly what happened.

Q. Did he tell you that he was trying to get a lawyer at that time?

A. Yes, he was.

Q. And did he tell you at that time that——.

Mr. Mulkey: Just a moment, Counsel. I am going to object to that question, whether the man wanted a lawyer, had a lawyer or intended to get one has nothing to do with the freeness and voluntariness of the statement.

Mr. King: If the Court please, I intend to show by this [fol. 1010] witness—and he has just said he has not conversed with me at all and I don't even know the man, we have never been acquainted——.

The Witness: Not to my knowledge.

Mr. King: Now, if the Court please, out of the lips of this witness I wish to elicit this information, and I am sure the witness can give it to us: That when he went in

the first time to talk to Jack Jack said that he had requested a lawyer on numerous occasions from the sheriff's department, and from the sheriff himself, and that they had not permitted him to talk with a lawyer up to that time.

Mr. Mulkey: Just a moment.

Mr. King: That he wanted to tell the lawyer what had happened there and he didn't have a lawyer.

Mr. Mulkey: Just a moment, Counsel. Whether this is true or not it still does not go to the question of voluntariness. This is adjudicated by large volumes of case law.

The Court: Ladies and Gentlemen, you are to disregard the statement just made by Mr. King. Whether Mr. Atchley did or did not have a lawyer has no bearing on this particular point.

Do you have any other questions, Mr. King?

Mr. King: Yes. Thank you, Your Honor.

Q. Now, going back to the second conversation you say that you took some notes at that time?

A. Yes.

[fol. 1011] Q. You had talked with the officers when you went back in the second time, you had stopped and talked with Mr. Spann and some members of the sheriff's department?

A. That's when I left Jack the first time I talked to the undersheriff, that's right.

Q. The undersheriff? Was any other person present?

A. No, not right at first there was not, no.

Q. Isn't it true that the undersheriff requested you to come back and have a further conversation with Jack?

A. Well, I had to get some information, Mr King. In a way I will say yes and no on that particular answer. I had to get information when I went back to the office also and I was planning to come back and see Jack.

Q. But the undersheriff did suggest that you come back?

A. That is right.

Q. And he told you at that time that they would tape record conversations?

A. He asked me if I would mind and I said, "Well, no, I wouldn't mind at all." Jack give me the information, he knew it was going to be a matter of record. I told him I had to report it to the company. I could see no harm in taking a tape recording.

Q. But you didn't at that time, of course, know that it was going to be offered in evidence here?

A. No, I can't truthfully say I did, sir.

Q. Now, at the time the Officer Spann asked you to go in and question the witness he said substantially this, did [fol. 1012] he not: "You go back in please and question Atchley and bring out all of the various points that we discussed this morning so that we can take it down on the tape recorder."?

Mr. Mulkey: Just a moment, Your Honor. This again does not go to voluntariness or freeness of the statement.

Mr. King: I submit, if the Court please, it is the very essence of voluntariness, whether or not this defendant did voluntarily make a statement.

Mr. Mulkey: What Mr. Spann——.

Mr. King: He made the first statement it is true. Now I am talking about the second statement that was taken down by tape recording.

Mr. Mulkey: What Mr. Spann may or may not have said about this man, about what he wanted him to bring out on the tape, goes in nowise to any voluntariness of this defendant. On cross examination Mr. King can bring out whatever he thinks he has in mind.

The Court: I think the objection is well taken. It will be sustained, Mr. King.

Mr. King:

Q. Now, you did talk to him at some length about what occurred over in Gridley?

A. I did, yes.

Q. And you don't know, do you, whether or not every word that you uttered there was taken down by tape recording?

A. I had a fair idea it was. I did not know it was actually taken until after I walked out of the room and they had taken Atchley downstairs and they took us [fol. 1013] upstairs the second time when I was talking to Vernon, Jack, and took us into a room and they said somebody was in the other room and they took us upstairs.

Q. Was that the second time?

A. That's the second time, right.

Q. At what stage of the proceedings did they take you upstairs?

A. Pardon?

Q. At what stage of the conversation did they take you upstairs? Did they come in and break into the conversation and take you upstairs, or just how did they do that?

A. Oh, no, no. I was upstairs. They took me up to this room and then they brought Mr. Atchley and right after I was seated there myself.

Q. And that was on the second——.

A. That was on the second floor, yes, sir.

Q. No tape recording was taken at the first conversation down in the lawyers' room that you know about?

A. Not to my knowledge. The first and second conversation was just about the same except I asked more questions the second time and this tape recording here, as I just heard this down in the District Attorney's, is the same one.

Q. Yes. It records parts of your—or attempts to record part or all of your conversation, does it?

A. Yes, it does.

Q. Was anything else said? You were down listening to it. Was there anything else said that wasn't taken down [fol. 1014] by the tape recording at that time?

A. Well, there was a brief—right at the first of the tape there was a brief, very dim at the very first part of the tape where Vernon was telling me to go out and see his brother and his sister-in-law regarding his little daughter Brenda because he was quite concerned about Brenda.

Q. I see.

A. It was the directions he was telling me to go out there.

Q. Concerning the matter of the beneficiaries you said something about a final beneficiary. Would you explain that to me? Does that mean that all of the children would have to die first before Jack would take anything by the policy?

A. Yes, sir.

Q. Is that what I understand?

A. Yes, sir. And that is all five children. In other words, you have your primary beneficiary, your second beneficiary and your primary beneficiary, which would be Jack him-

self. He would have to wait until all five children were deceased before he would get one dime out of it.

Q. Now, were you talking with him about that very point when you—in your first conversation?

A. Not to my knowledge.

Q. You might have?

A. I might have, yes, sir.

Q. Do you know whether or not Jack knew that the conversation was being recorded?

Mr. Mulkey: I am going to object to that question, Your [fol. 1015] Honor, on the grounds it bears in nowise on the voluntariness. There is no duty in any way to inform a defendant that his conversation is being recorded at any time.

The Court: The objection is sustained.

Mr. King: Very well, Your Honor. You may proceed, Mr. District Attorney. Play your recording. Of course, my objection goes to it.

Will you approach the bench, Counsel.

(The following proceedings were had out of the hearing of the jury:)

Mr. King: Your Honor, do you want the court reporter to take down the tape recording? It might have been changed and might not.

The Court: I am going to instruct him that it is not necessary. I will do it on the record. The tape speaks for itself.

(The following proceedings were had in the hearing of the jury:)

The Court: Mr. Reporter, it will not be necessary for you to take the tape as it is played back.

(Thereupon the tape recording was played.)

[fol. 1016] Mr. Mulkey: Is that a recording of that conversation at the time that I have mentioned to you before?

A. Yes.

Mr. Mulkey: Your witness.

OFFER IN EVIDENCE

The Court: Are you going to offer the tape?

Mr. Mulkey: Yes, Your Honor, I would like to offer this tape in evidence at this time as People's Exhibit No. 34.

Mr. King: Well, Your Honor, without going into all the objections I have heretofore made, I would like to have the record show that the objections have been entered the same as if they were fully set forth.

The Court: The record will show that the objections are noted and the Court has ruled upon them. I think before you cross examine, Mr. King, if you wish we can take a recess.

Mr. King: Yes, if Your Honor please.

The Court: At this time we will take a 10 minute recess. Please remember the instruction of the Court, Ladies and Gentlemen.

(At this time a short recess was had, after which the following proceedings were taken:)

Mr. King: May it please the Court——

The Court: (Int.) Let the record show the jurors are present and seated.

COLLOQUY BETWEEN COURT AND COUNCIL

Mr. King: If the Court please, in your absence and in my absence a moment ago while part of the jurors were seated here in this Courtroom, part of them had gone outside, Mr. Grinnell saw fit to come into the Courtroom and wave around two pictures here which, while they have [fol. 1017] been introduced in evidence, I am indicating Photographs People's Exhibit 17 A and People's Exhibit 17 B, so that the jury could see them. Now I have been trying my best to carry on and conduct a legitimate and a fair trial here and I know Your Honor appreciates what we have done here but I do feel that counsel should be admonished that during the recess that he should not present evidence to part of the Jury in the absence of the rest of the jury. I don't feel it is fair to waive around pictures of that character before this jury or part of it.

Now while the jury no doubt will see the pictures and they will be placed on the board, I do feel counsel should be admonished not to do that again; and further while I

realize in his zealousness to prosecute this case he probably did it inadvertently it does have a bearing on what goes on here. I do request Your Honor to admonish those members of the jury who saw Mr. Grinnell waving them about to disregard entirely any inferences concerning them.

Mr. Grinnell: Well, Your Honor——

The Court: Mr. Grinnell, it is not necessary to reply. Mr. King, I know Mr. Grinnell was thinking of preparing for a witness who will appear here in a moment or two and I am sure prejudice has been done. Those pictures are admitted in evidence and they should all be seen and studied by the jury, so let it be understood by all that Mr. Grinnell was not trying to present evidence to part of the [fol. 1018] Jury during the recess or anything of that kind.

Mr. King: That is correct, Your Honor, as I say it was probably through inadvertence.

Mr. Grinnell: Well, I didn't even have the pictures, I was just taking the others off the blackboard when Mr. King was in here.

Mr. King: There is another matter before I start cross examination of this witness that goes to fairness in the progress of this trial. I followed the witness out to the anti-room in the brief recess that was just had and I asked the witness if I could visit with him. He indicated his affirmness that he would talk with me about what presumably I was going to ask him about what transpired in the conversation, which I have a proper right to do and thereupon Mr. Mulkey came and said he didn't want him to talk to me. Mr. Mulkey waited there while I was there for five minutes or more. He told the witness whatever I wanted to ask him I could ask him under cross examination, which is right, I mean which is true, I can ask him proper questions on cross but I do feel that that did prejudice this witness as against me and does make my burden a little harder to cross examine him after Mr. Mulkey gave him a dissertation on what I might do in my private conversation with him.

The Court: Now, Mr. King, you were given a copy of these tapes quite some time ago and you were given a reporter's transcript in printed form of what is contained on the tapes and you knew that Mr. Travers was going to

be a witness here. Your observation and remarks are [fol. 1019] entirely out of order and I request you Ladies and Gentlemen to entirely disregard them. Now please proceed.

Mr. King: Very well, Your Honor.

Cross-examination.

By Mr. King:

Q. Mr. Travers, you say you have been a friend of Jack's for this past year and that you have done business with him?

A. That is right.

Q. Now when the Sheriff requested you or the—I will withdraw that. When Mr. Spann, the Undersheriff, requested you to go in and question the accused, and recalling your attention to that conversation with Mr. Spann, just what did he ask you to do?

A. He said that they were going to take a tape recording and I assumed they were of the conversation. He said, "We would like to have a tape recording of that" and he asked me if I would mind and I said, "Absolutely not", Jack knew it was going into the company and there would be a record of the conversation that he gave me that morning so I could see no harm in that myself and I said, "Fine" so we went up to the room and talked to Jack about it.

Q. Yes, now did he tell you to bring out all of the things that you talked about on your morning conversation?

A. Well, as well as I can remember, Mr. King, he didn't mention that to me at all. As far as I can remember he just told me to go up and ask Jack about the same con- [fol. 1020] versation that was given that morning, which I did.

Q. It wasn't your intention at all to slant the questions from the prosecution view point, was it?

A. I don't quite understand that.

Q. In other words in listening to the tape recording I noticed that in quite a number of instances you would ask him questions which were slanted from the prosecution's viewpoint of this case.

Mr. Mulkey: Just a moment, I think that is a conclusion Mr. King has drawn from the tape that these questions were slanted from the prosecution's viewpoint of the case.

The Court: The objection is sustained. If you wish to ask a question along that line you may ask the witness if he did slant questions but you need not express your own opinion, Mr. King.

Mr. King: Very well, Your Honor. (Questioning witness) Now while you were questioning the witness, well, he wasn't a witness at that time, excuse me, when you were questioning Jack.

A. Yes.

Q. You knew that he wasn't under oath, he wasn't a witness, that is right, isn't it?

A. That is right, I knew he wasn't under oath to answer that.

Q. But you felt he was telling you the truth, did you?

A. Yes.

Q. And you feel that the tape recording is the truth?

A. Yes, that is exactly what Jack told me both times.

Q. And the statement he made in the tape recording that he had no intention to shoot her, and let me read just [fol. 1021] exactly what he did say in that regard, was the truth.

Mr. Mulkey: Just a moment, don't answer the question.

Mr. King: I will reframe the question.

Mr. King:

Q. I am calling your attention to the part of the tape recording on Line 25.

Mr. Mulkey: What Page?

Mr. King: Line 25, Page 47. Ques. "She was running around with fellows" and your answer was, "Yes". That question and answer transpired in the tape recording, did it?

A. Yes, it did.

Mr. Grinnell: That wasn't his answer, Mr. King, you said, "Your answer was 'Yes' ", that was Mr. Atchley's.

Mr. King: Excuse me, yes, that is correct. (Questioning witness) And then there was a question, "Oh, I see. God

oh mighty, that would make a guy feel sort of bad" and he answered, "Uh-huh" and then you queried him, "Did you just plan on scaring her or scaring him" and he answered, "Yes, just scaring him" and then he went on to say, "But I didn't intend to kill her at all, not at all". He made that declaration to you?

A. He did.

Q. Now when he indicated to you and I don't see it in the record here nor can I make out from the tape recording when he indicated that he had the gun in his belt, was it—you mean to say that the gun was shoved down like this (indicating), indicating down between his shirt and his belt?

A. That is the way I understood it, yes, so that the gun [fol. 1022] was actually visible.

Q. And when he showed you down there that was the way it was, was it?

A. Yes.

Q. Of course we don't know except what you tell us here because just he and you were present?

A. That is right.

Q. And you are very definitely sure that he——

A. (Int.) That is right.

Q. He indicated it that way (demonstrating).

A. Jack Atchley showed me like that (demonstrating) the gun was actually visible.

Q. Did he tell you he had gone into the little house in the back of the dwelling, if you can remember, in either your morning or your afternoon conversation?

A. Mr. King, I don't remember.

Q. He might have told you that in the morning?

A. He might have, I don't remember.

Q. But you didn't question him any as I take it in the afternoon conversation concerning that?

A. I just can't recall, Mr. King, whether he said so or not. He told me he was by the side of the house, I remember that very distinctly.

Q. But in this tape recording you didn't hear anything about the little shed, you didn't question him anything about that on the tape recording?

A. No, I don't believe I did. He said he was waiting

by the side of the house, that he was assuming or actually——

Q. (Int.) Just a moment, are you telling what you [fol. 1023] thought he said or what he thought he did.

A. No, what he actually told me.

Q. Oh, I see.

A. These two conversations, about the morning and the afternoon, are so closely knit that some of the conversation, I mean, well lapped over into the first and the second, if you understand what I mean.

Q. Well, we don't have the first conversation here.

A. No.

Q. In fact it was interspersed with this, you were just bringing out points in the tape recording that hadn't been brought out in the conversation before.

A. They had all been brought out that morning, Jack told me everything that morning.

Q. And he told you freely, did he?

A. He sure did.

Q. And going into that matter, when he had the discussion with his lawyer, did he make any declaration to you at that time that he was going to tell his lawyer exactly what happened?

Mr. Mulkey: And what time, Mr. King?

Mr. King:

Q. In the morning conversation.

A. It seems to me as I recall that Jack was, actually didn't have a lawyer at that time. One was spoken for and I believe it was your name that was mentioned, Mr. King, and then Mr. Atchley told me he didn't know whether you would be his lawyer, but he was contemplating on obtaining a lawyer in San Jose, California, the name was repeated on the tape.

Q. Yes, I heard the lawyer's name, however, I am not acquainted with him, but he did mention he was trying to get ahold of me, did he?

A. No, I think he said his——

[fol. 1024] Q. (Int.) His brother was trying to get ahold of me at my residence in Pulga?

A. Actually what was said, what actually transpired he

said, if I recall right that he didn't know if you would take the case.

Q. Well, would it refresh your memory at all if I told you that he referred to his brother calling me, but my phone, that they couldn't get through on the phone or something of that kind, does that refresh your memory at all?

A. No, it does not, Mr. King.

Q. But he didn't say that he had talked to me at that time?

A. I can't remember if he said he had or hadn't. That you had refused or he didn't know whether you would be his lawyer or exactly what transpired as far as his lawyer was concerned.

Q. For your information I hadn't talked with him at that time.

Mr. Mulkey: Just a moment, counsel. Is Mr. King under oath, Your Honor, I don't think that——

Mr. King: (Int.) I will withdraw that statement, Your Honor.

The Court: Ladies and Gentlemen, you are instructed to disregard side remarks of counsel such as that.

Mr. King:

Q. Now getting the whole conversation, I mean by that the conversation in the morning and the conversation in the afternoon that was recorded here, you say, did I understand you to say that part of the conversation that you had in the morning wasn't reduced to the tape recording here in the afternoon?

A. The whole general conversation of the first interview [fol. 1025] with Mr. Atchley and the second interview was almost identical, there might have been a few little incidents that was left out, that possibly was left out as far as this building you are referring to in the back. I remember reading something about a building in the newspaper and that is what is actually confusing me whether it was actually brought up in the morning, whether it was in the newspaper or whether it was in the second interview.

Q. Yes, I see, in other words it is indistinct in your mind

just what statements he might have made in the morning.

A. It is just on this one particular instance.

Q. Well now—but he did tell you in the morning before the tape recorder was on that he had gone over there to look for his wife, he did say that, didn't he?

A. He went over to meet his wife there.

Q. Meet his wife, he had a date with her, did he?

A. Well, as I recall Jack said he went over there to wait for his wife that she was at a dance I believe he said, at Robinson's Corners I believe.

Q. Well, that was generally on the tape recording, now I am trying to refresh your memory about the morning conversation. He did say he had a date with his wife in the morning conversation?

A. I think he did, about 8 o'clock at the dance, that he was suppose- to meet her at the dance and he had some work to do and he couldn't make it and then he met some fellows and had a flat tire and by the time he got through [fol. 1026] with the fellows he was meeting and said good bye, it was after midnight, I believe, and then he went to Gridley and he waited for his wife, expecting she would come home, and the fact he knew she was running around with some one, that he was going to wait there and that is where in the second conversation, and also in the first conversation, it was brought up that he waited for his wife along side of the house.

Q. Along the corner of the house?

A. Yes.

Q. Now just a moment. Going along with that, did he tell you he went to Robinson's Corners about 12 o'clock of that day, or that evening?

A. I can't recall whether he did or he didn't.

Q. He might have told you that?

A. He might have, I don't remember. As I understood him he said that he did not because he was with the fellows and they went over to some tavern and they had a beer, I believe, and he had a flat tire and it was too late then.

Q. What time was the flat tire, did he tell you?

A. I don't recall the time but it was between say noon and midnight, I can imagine that.

Q. But is it your statement now that he didn't tell you that he went over to Robinson's Corners?

A. As I say I can't remember.

Q. Now did, in either of the conversations did he fix the time I heard on the tape recording, but in the conversation you had with him in the morning, did he fix the time that he arrived in Gridley exactly, did he tell you [fol. 1027] anything, for instance, "I looked at my watch and it was that time", anything of that sort?

A. No, not the exact time, he said approximately as I recall between 1:30 and 2 o'clock also in the morning conversation and also I think that is what he stated in the tape recorder too in the second conversation.

Q. In the morning conversation you didn't pin him down as you did in the afternoon conversation as to how many minutes he was there, I take it?

A. It was about the same general conversation about the time. Actually when Jack was telling me this, I was just sitting there and listening in the morning. It wasn't mentioned.

Q. You weren't questioning him then?

A. Yes, I was actually asking him questions because I was concerned too.

Q. But not as many questions as you asked in the afternoon after the officer asked you to develop the story?

A. No, sir.

Q. And Officer Spann did ask you to develop the story so that he would have a tape recording of it?

A. Well, I knew that he was going to have a tape recording as I told you, but Mr. Spann did not say to go in there and ask all these questions. I would like to clarify before this Court at this time that I was a Deputy Sheriff for three and a half years.

Q. I was just going to ask you that question.

A. And it was just a general line, and I did work homicide and all felonies and it is general routine of asking questions, as a line of interrogation, of questions that I [fol. 1028] did ask Jack Atchley.

Q. I was just going to ask you that. Now in your experience as a police officer, where did you have your experience?

A. Los Vegas, Nevada.

Q. And were you working under the Sheriff's Office on homicides at that place?

A. Yes.

Q. And you have had a good deal of homicides, possibly, have you?

A. Two years, sir.

Q. And you have interrogated many witnesses?

A. I have.

Q. And you know then what is necessary to prove in order to convict a witness of any crime involving a homicide.

Mr. Mulkey: Just a moment, I know many officers who do not know what is necessary to convict somebody and I don't know that has anything to do with this case, the question was, "And you know what it takes to convict a man of homocide" referring to this man's experience as an officer in Nevada.

The Court: I don't see it has any bearing. The objection is sustained.

Mr. King: Very well. (Questioning witness) Mr. Travers, I will ask you generally when you took statements from witnesses involved in a homicide you would ask certain questions concerning those homicides, would you not?

A. That is right.

Q. And they would follow more or less of a definite pattern, isn't that so?

A. That is right.

[fol. 1029]. Q. And that definite pattern, sir, from your experience was followed generally on this tape recording.

A. From a habit, yes.

Q. You called on your experience as a police officer to interrogate the witness so that the People would—well, I will withdraw that. You called on your experience as a police officer to interrogate the witness to find out whether or not a crime had been committed, isn't that true?

A. Actually, Mr. King, I had a chance to go into law enforcement. And to answer your question, I see what you are getting at. This information that was given me was comp-etely voluntary. I was not turning into any sleuth or detective or anything like that. I got out of the detective work and what I wanted to actually get from

Jack was actual information and the information that Jack gave me was given completely voluntary.

Q. And you know it was the truth?

A. I sure did. Jack has never lied to me yet.

Mr. Mulkey: I will ask that question be stricken, that is asking for the witness to characterize testimony which is a job for the jury.

The Court: Which answer?

Mr. Mulkey: "I thought it was the truth" or, "You thought it was the truth". The witness state whether this was the truth or not, Your Honor. That is what the 12 people will decide on the trial of this cause.

The Court: The objection is sustained and the answer [fol. 1030] will be stricken.

Mr. King: Very well, Your Honor, (questioning witness). Now Mr. Travers, isn't it true that the experience that you have had as a peace officer caused you in this case to query the witness with that in mind, that is to say, when you asked him the questions, as you ask him here, that we heard over the tape recorder, you were following the definite pattern that law enforcement officers ordinarily proceed in a questioning of a witness were you not?

A. Well, Mr. King, any time a man tells me he just killed somebody, I think it is the job of every citizen to find out what happened and that line of questioning was actually semi-professional due to the fact I had had that work, and naturally that is the only way I would question anybody and when Jack was giving me that information he was telling me what I assumed was the truth, the man has never lied to me that I know of and so I was concerned with it.

Q. You found him to be truthful?

A. Right.

Q. But my point was, and what I want to ascertain was, of course you can't put yourself in the position of the accused, no- do we want you to, but don't you feel in questioning him you could have brought out many things that would have been to his advantage, had you cared to do so?

A. I see no train of thought here that I thought was of disadvantage to Mr. Atchley.

Q. Could you have—you feel it is not of a disadvantage to him?

A. I see nothing in what he told me that is of disadvan-
[fol. 1031] tage to Mr. Atchley.

Q. Of course that is entirely up to the Jury.

A. That is right.

Q. But it was from your general conversation with him now both the morning when you talked with him and there was no recorder and in the afternoon when the statement was recorded that Jack gave you a full and complete account of what occurred that evening.

A. What Jack told me I assumed that it was an exact account of what had happened.

Q. I notice in the tape recording about the 20 or 25 minutes he said he was over there, did it occur to you to ask him where he was or what he was doing at that time, or did he explain that to you in the morning conversation?

A. Now, over where?

Q. Over Gridley, as I got from the tape recorder here he was over there for 20 or 25 minutes?

A. Yes.

Q. Did it occur to you to ask him in the morning conversation what he was doing during that 20 or 25 minutes?

A. Yes, that was brought up in the morning conversation.

Q. What did he say?

A. He said the same thing he said in the second conversation.

Q. He was waiting for his wife to come home?

A. Right.

Q. He was standing around there by the corner of the house?

A. Yes, exactly.

Q. Did he tell you anything in your morning conversation about seeing her come through the gate?

A. Yes, he did, that was all brough- out exactly the same.

[fol. 1032] Q. And did he say something in the morning conversation about seeing her drive into the carport?

A. The carport, I remember something about a carport, whether she had parked the car in the carport or parked it out in the road, he said she came through the gate and that he stepped around the side of the house directly in her path in front of the door.

Q. That is the same as the tape recording?

A. Yes, it was the same general conversation in both, the only thing I said that was different between the first and the second is I couldn't remember in either one of the conversations about going into a little building that you mentioned, I can't remember that in either morning conversation.

Q. Then changes are it is probable he didn't tell you that or you would have remembered it.

A. I think I read it in the newspaper to tell you the truth.

Q. Your present memory, there was no conversation about that?

A. My present memory regarding this little building that he went into.

Q. In fact you didn't question him very carefully, I mean very minutely perhaps about just what he did while he was there for the 20 or 25 minutes, you didn't go into that, did you?

A. No, I did not, Mr. King. Every question that was directed to Mr. Atchley was what he told me in the morning conversation.

Q. And you say he started in to tell you and he did unfold the whole story?

A. He sure did, yes, sir.

Q. And that was right after telling you- by the way, did he make a statement to you that morning that, if you [fol. 1033] recall, that he was waiting until his lawyer came so that he could tell his lawyer exactly what happened?

A. Not to my knowledge. I will repeat that again, Mr. King. I think, Jack, as I remember, Jack told me that I believe it was your name, that the lawyer that was suppose- to represent him had not shown up and he didn't know if he was going to take his case but that he was contemplating on getting a lawyer out of San Jose and the name there, I don't remember the name, I have heard it

twice on the tape but it was an Italian name, I can not repeat it, I do not remember it.

Q. Excuse me please just a moment. Didn't Jack say something to you that morning about it was just like the other time when the gun went off, that they were having a wrestling match over that gun, that same gun, didn't he go into some dissertation on how the gun had gone off once previously?

A. You are speaking of the——

Q. (Int.) The morning conversation.

A. Regarding how the gun went off?

Q. Yes.

A. He told me in both morning sessions that she grabbed the gun from his waist band.

Q. I understand that, but I am not talking about that conversation, I am talking about something that happened previous to that out at Palermo, didn't he tell you on the morning conversation that she had grabbed the gun and they had a wrestling match over it and the thing went off once or twice and went through the window, does that [fol. 1034] help you any?

A. No.

Q. Did he discuss that with you?

A. Not to my knowledge.

Q. You don't recall that discussion?

A. No, I don't recall that.

Q. Now in the morning conversation, Mr. Travers, and I am reading from Line 4 on Page 48, ques. "And you had the gun in yo r belt. Did you make an at:empt to pull the gun or anything? Ans. No, sir. When I seen nobody but her I didn't make no effort whatever. Ques. She seen the gun? Ans. She seen the gun. Ques. Then what happened? Ans. She grabbed it, lunged right onto it. That's all I could do. I didn't know anything else to do". Did he make that same general statement in his morning conversation, that she grabbed the gun?

A. Yes.

Q. And that they had a struggle over the gun?

A. Yes.

Q. And that the gun had gone off?

A. That the gun had gone off, yes.

Q. Did he tell you in the morning conversation as he

did in the afternoon conversation that he did not intend to kill his wife?

A. Yes, he did.

[fol. 1035] JAMES LOWE RICHARDSON, called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Will you please state your name, doctor?

A. James Lowe Richardson.

Q. Are you a professional man, doctor?

A. Yes, I am a physician, licensed in the State of California.

Q. How long have you been licensed as a physician?

A. I received my license here in 1947.

Q. Prior to that were you licensed in any other state?

A. I was licensed in the State of Utah in 1941, graduated from the University of Pennsylvania in 1940.

Q. In addition to the qualifications that you just told us about do you have any specialty, doctor?

A. I have a specialty in pathology.

Q. Is that a board specialty?

A. It is.

Q. Generally speaking, so that this jury will understand, what is the distinction or differentiation between a pathologist and a general licensed practitioner?

A. Well, as far as training is concerned, we have three to four years extra training in our specialty in pathology plus another year of work in pathology before we can take our board examinations. Pathology itself is divided into two parts: Pathologic anatomy is the study of the [fol. 1036] tissues of the body and the diseases of the body, and clinical pathology, with several subgroups, such as serology, penology, chemistry and so forth. I am certified in both pathologic anatomy and clinical pathology.

Q. Why is it important, doctor, or what significance is your training as a pathologist over and above that of a general doctor in examining the person or body of a deceased?

A. We have had special training in this. In the training that I received at the United States Naval Hospital in Oakland from 1946 to 1947 I personally did approximately 500 autopsies and I observed that many more autopsies. Since that time I was the pathologist on the Island of Guam and medical examiner there. I was pathologist at the United States Naval Hospital in Jacksonville, Florida. I was a year in Oakland as pathologist, a year in Vallejo. I been in my present office in Marysville for about two and a half years as pathologist.

Q. Have you testified in other cases as a pathologist, Dr. Richardson?

A. Yes, I have.

Q. Has that been in the Superior Court?

A. Yes.

Q. And in about how many cases have you testified as an expert in the field of pathology, Dr. Richardson?

A. I would say approximately fifty.

Q. Fifty times?

Is the Court and counsel satisfied with the doctor's qualifications in the field of pathology?

[fol. 1037] Mr. King: Yes, I think the doctor, from his statement, is eminently qualified.

Mr. Grinnell: Thank you, Counsel. That, of course, is a foundation to all of the questions.

Q. Dr. Richardson, were you asked to perform an autopsy upon the body of Katherine Marcella Atchley?

A. At that time I think we had her name as Ferris, as Marcella Katherine Ferris.

Q. That is the name you have it under in your file?

A. Yes.

Q. Well, if I told you that she was actually legally married to Mr. Atchley that would still be the same person we are talking about, is that correct?

A. I think so, yes.

Q. When did you have occasion to examine the body of the deceased?

A. Well, it was on the 3rd of August of this year. I began the examination at approximately 1:00 p.m., and that was at the Block Funeral Parlor in Gridley.

Q. 1:00 p.m. in the Block Funeral Home in Gridley?

A. Yes.

Q. What generally speaking do you do when you perform an autopsy? Do you understand my question, doctor?

A. Yes.

Q. Let me put it another way. Do you attempt as part of or is your examination directed towards attempting to determining the cause of death?

A. That usually is the primary reason for doing the autopsy. The other is to study the condition of the vari- [fol. 1038] ous organs and of the body in relation to any diseases she might have had prior to death.

Q. I see. Did you examine the body of the deceased to determine what the cause of death was?

A. Yes, I did.

Q. What did you find as the result of your examination to be the cause of her death?

A. I have the cause of her death as multiple gunshot wounds.

Q. Multiple gunshot wounds? Can you tell us at this time, doctor, based upon your examination, where you found those gunshot wounds to be in or upon her body?

A. There were two wounds- —.

Q. Just tell us generally speaking and then I am going to have you describe them in detail.

A. There were two on the right side of the head and the remainder were in the thorax—that is the chest.

Q. The chest? To a layman like myself this would be referred to generally as a torso (indicating)?

A. Yes, it would be called a torso.

Q. Do you mind if I use that phrase since I am more familiar with it?

A. Yes.

Q. Thank you. All right. You found two wounds in the head, is that correct?

A. That is true—in the scalp.

Q. In the scalp? Let me show you People's Exhibit "23-B" for identification and I will ask you if that shows the wounds that you found in her head?

A. Yes, it does.

Q. On which side of her head are those wounds found, doctor?

[fol. 1039] A. They were on the right side.

Q. Did you probe or examine inside her head to find out what had made that wound there?

A. There is almost one wound through the skull. There was a definite connection between these two wounds of the scalp. There was definite damage to the right side of the brain and a fragmented bullet was found in the right occipital fossa.

Q. Just so the jury and I may follow you would you step up and use my head and point out to the jury where the wound was, the entrance and where you found the portion of the shell inside her head.

A. The two wounds were approximately this position. There was a connection between these wounds beneath the scalp and the direction of the bullet had gone approximately from here and was found inside of the skull. It didn't come through the skull in the back part of the head.

Q. It was found inside of the bone or the skull?

A. The skull, inside the skull.

Q. Would you examine this little pellet or portion of a pellet which I have in my hand and let me ask you if you recognize that as the pellet that you found inside her head?

A. This is similar to the one that I had. It is not a complete bullet.

Q. In other words, you didn't find a complete bullet inside her head?

A. No, I didn't.

Q. Now, would you explain the significance of that, [fol. 1040] doctor, in relation to the second wound that you found in her head?

A. Well, I felt that when the bullet struck the skull it was fragmented. A portion of it went through the skull and in the direction that I have illustrated. And the second portion went along the skull and came out in the second wound in the scalp.

Q. In other words, if I follow you, doctor, you are saying that this bullet broke in two, a portion of it going through the skull and which you found in the back of her head, and

a portion exiting through this second wound that you have indicated you had found near the first one, is that correct?

A. That is the way I interpret it.

* * * * * * *

[fol. 1041] Mr. Grinnell:

Q. Now doctor, the other wound you found in her body you indicated you found in the torso, the portion between the head and the belt, is that right?

A. Yes, that is true.

Q. While they are looking at that picture may I ask you another question. Would you say the point you found this bullet in the back of the skull was lower or higher in elevation, the entrance hole or about on the same plane?

A. Just slightly lower.

Q. Slightly lower?

* * * * * * *

[fol. 1042] Mr. Grinnell:

Q. Would you take those pictures, doctor, and examine them for a moment. You recognize those pictures, doctor?

A. Yes. This is the body on which I performed an autopsy.

Q. That is the body of the person who is Katherine Marcella Ferris, is that correct?

A. That is correct.

Q. Do those pictures show the body of the deceased, and in particular the position of the bullet holes upon or in that body?

A. Yes, on the torso.

Q. And are those holes in the positions in which you found them when you examined them?

A. Yes, sir.

Mr. Grinnell: In order to facilitate Dr. Richardson's testimony I will now offer these pictures in evidence, Your Honor.

Mr. King: My objection, Your Honor——. I thought he was offering them at that time.

The Court: It is understood your objection runs to the introduction of pictures and the objection is overruled. [fol. 1043] They will be admitted with the same numbers

as they had heretofore. Does that complete "23-A through F"?

The Clerk: Yes, it does.

Mr. Grinnell: For the record I am showing Dr. Richardson People's "23-F" and People's "23-A" which has already been admitted into evidence, and ask you, doctor, if "23-F" shows ones of the holes in the body?

A. Yes.

Q. Is that a hole made by a bullet?

A. Yes, that is a bullet hole.

Q. That is a bullet hole?

A. Yes.

Q. Where is the point of entrance, doctor?

A. The point of entrance appears to be in the anterior portion of the chest at approximately the left mid clavicular line—that is taking the line of the clavicle and bringing it down in this fashion.

Q. Over the left breast?

A. Above the left breast.

Q. Now I am going to show you People's "23-A" which has been admitted into evidence and ask you if that purports to represent the back of the victim?

A. Yes, it does.

Q. Is there anything in that picture which you are able to connect up with the hole over the left breast?

A. Ye. There is one that is about three quarters of an inch to the left of the posterior midline or to the left of the backbone that is definitely connected with the bullet hole in front.

Q. Is there any difference in the elevation or the line, the path the bullet followed between the point that it entered [fol. 1044] and the point that it came out her back?

A. They are approximately the same level. The one where it came out the back might be slightly lower.

Q. I am going to give you a pointer, doctor, and ask you to point out the hole over the left breast that you have just referred to and then indicate to the jury the hole in the back that you were able to connect up with that hole in the left breast.

A. That is the one in the left chest here. This is the one in the entry part of the left chest here.

* * * * * * *

[fol. 1045] Q. Would you just draw a circle around that one the left breast and put a one.

(Witness marking on photograph)

Q. Now would you draw a circle around the hole in the back which you connect up with that hole over the left breast. Would you put one by that so we will now—so we are talking about the same one.

(Witness marking on photograph)

Q. You say that the point of exit is slightly below the point of entrance?

A. Yes.

Q. I show you People's Exhibit "23-G" in evidence and ask you if there are any wounds shown in that picture?

A. There are three shown in this picture.

Q. Where are they found, doctor?

A. Well, probably best described in the right armpit, two of them, one is a little lower than that.

Q. Could you indicate to the jury on myself where you found those and then we will put the picture up.

A. Two of them are located here and one that is lower—approximately here.

Q. Now, doctor, I notice that you have raised my arm.

A. You have to to show the bullet wound.

Q. In other words, it would be——.

[fol. 1046] A. If the arm were down the arm would have been shot.

Q. And you found no evidence of a shot passing through the arm, is that correct?

A. That is correct.

Mr. Grinnell: I am now putting on the board, Your Honor, People's Exhibit "23-G" in evidence showing the three holes under the right arm.

Q. Now, doctor, did you in performing the autopsy follow the path of the bullet through the body?

A. Of those three I definitely followed the path of two of them.

Q. Can you tell us at this time which two were able to follow, which two you could follow a path through the body?

A. Very definitely this lower one, and very probably this second one here.

Q. Would you mark those with a circle, doctor? And since you have used the figure one would you use the figure two and three on those? Now be seated again for just a moment, doctor.

I am going to show you People's Exhibit "23-F" in evidence and ask you if that shows a bullet wound on the left side of the victim's body?

A. Yes. It shows a break in the skin and there is quite a bit of hemorrhage in that area.

Q. Now, doctor, you have told us a moment ago that you were able to follow the path of two of these bullets through the victim's body, two of them that entered under her right armpit, is that correct?

A. Yes.

Q. And you followed those through the body to what [fol. 1047] point? Can you show us on the photograph?

A. From the right side of the body one went through the lung, right lung, through the liver, and in back of the stomach, hit the spleen and ended up at this point.

Q. Would you draw a circle around the point where you found——. By the way, did you find a .22 bullet lodged in the skin at that point?

A. I found two.

Q. Do these appear to be the two (indicating)?

A. They appear to be similar, yes.

. . . . . .

Q. Now would you draw a circle on the last photograph that I put up on the board showing where you found the two slugs from People's Exhibit "24".

A. Well, one was immediately beneath this break in the skin. Whether it can be seen or not there is a little darker area there. Both were easily felt through the skin at this point.

Q. Would you draw a circle around them? About how far apart were those two bullets?

A. Approximately about a half inch.

Q. About half an inch apart?

A. Yes.

Q. And you connect these two that you found here with

the two that you have circled 2 and 3 here, is that correct?

A. That's right.

[fol. 1048] Mr. Grinnell:

Q. What was the line or path through the body? You have indicated it was sideways since it entered on the right side and was found on the left side, but what was the path or line through the body regarding elevation, doctor? Was it higher, lower, or about the same.

A. Well, on this one marked number 2 it was approximately the same. On this one marked number 3 the point of entry was slightly higher than where I found the bullet.

Q. Slightly higher?

A. The point of entry, yes.

Q. You may be seated again for just a moment, doctor. Now, in addition to the one in the left breast which we have discussed and the three in the right armpit area which you have told us about and which you said that you followed two of them through the left side of her body, did you find any other entrance wound in her body?

A. There were two others, two other apparent bullet wounds in the body, both of them on the right side of the chest, one as indicated in the right armpit and there was another one on the back, right side of the back.

Q. Very well. Now, before you get to that one would you mark--. You have used 1, 2 and 3. Would you mark the one which you are not able to follow through the body under the right armpit or find in the body would you [fol. 1049] mark that number 4 so that we know--.

(Witness marking on photograph)

Q. And that is the one that you were not able to find the bullet in the body, is that correct?

A. I found no bullet from that.

Q. No exit or pellet in the body, is that correct?

A. No. I was able to probe through this particular bullet wound and through this area here, and the probe met at the fourth lumbar spine here.

Q. By a "probe" you mean you actually put an object in and just followed the course of it through and you were able in that manner to follow the path of the bullet through the body?

A. Yes.

Q. And that is how you were able to follow it up to the point where you found the pellets, is that correct?

A. Pardon? Where I found what?

Q. How you were able to follow up from the right side to the left side where your found the pellet?

A. I could follow that right through the organs that were involved.

Q. Now, doctor, you numbered the one on the right armpit is that correct, number 4, the one you were unable to find the bullet in the body, that hole that was made by that hole?

A. Yes.

Q. Would you mark that number 5 on the back of the one that you have told us was the next hole that you found. [fols. 1050-1053] (Witness marking on photograph)

Q. And that is where in the back? How would you describe that?

A. Do you want me to illustrate on you?

Q. Yes.

A. Approximately here.

Mr. King: Would you give a vocal description for the purposes of the record, doctor.

The Witness: That was three and three-quarter inches to the right of the midline at the level of the fourth—between the third and fourth lumbar vertebrae—rather thoracic vertebrae.

Mr. Grinnell:

Q. Now, doctor, would you glance up at the board for just a moment. Do you see the two enlarged photographs to the top of the board? Is the hole that you have just told us about number 5 that you found in her back, is that the hole that is pictured here or where the spot is on the dress?

A. That corresponds to it, yes.

Q. And are the three holes that you found under the right armpit, are those the three holes that you see in the dress here?

A. They correspond to them, yes.

• • • • • • •

[fol. 1054] Mr. Grinnell: Doctor, do you have an opinion which of these five, actually six shots, the one in the head and the five in the body, do you have an opinion which of those was fired first?

A. No, I can't definitely state which was fired first.

Q. Very well, however, you can state, can you not, doctor, that the one in the head and the one in the left breast were fired from some point in front of the victim?

A. Yes.

Q. The gun was at some point in front of the victim when those shots were fired, the one in the head and the one in the left breast?

A. Yes.

• • • • • • •

[fol. 1055] Mr. Grinnell: If I said the right breast I meant the left breast. No. 1. (Questioning witness) Those were fired from a gun at some point in front of the deceased, is that correct?

A. That is correct.

Q. The three under the armpit were fired at some point from the side of the deceased, is that correct?

A. That is correct.

Q. And the one in the back was fired at some point from in back of the deceased, is that correct?

A. No. 5 was fired from some point at the back.

Q. Now, doctor, I would like to have you look at the second photograph over, that being People's Exhibit 23 A, and ask you if you note a mark on the deceased's right shoulder blade in that area?

A. Yes.

Q. You note that on the photograph, was that mark there when you examined the deceased?

A. Yes, it was.

Q. Can you describe the condition of that mark when you examined the deceased?

A. That was more of a superficial abrasion that was fairly well, you might say, scabbed over at the time of examination.

Q. In other words while it may appear in the picture to be of the same general character as the other holes it was not a bullet hole, was it?

A. I don't think it was a bullet hole.

Q. You can not connect it up with any bullet hole?

A. I couldn't connect it and it was entirely superficial.

Q. Were you asked and did you examine the dress of the deceased?

[fol. 1056] A. I did.

Q. And did you note a tear or hole in the deceased's dress up in the right shoulder area and about in the place where you found where that mark shows on her right shoulder blade.

A. Yes, I did.

Q. And did you examine that hole?

A. Yes, I have.

Q. Did you find any evidence around that hole of a bullet having entered at that point?

A. No.

Q. So you were unable in any way to connect up the scabbed over mark which shows at this point with any bullet hole either in the garment or any evidence around the hole that it was made by a bullet, is that correct?

A. That is correct.

Q. It just appears to be an abrasion of the skin?

A. That is my opinion.

Q. Now, doctor, in your opinion, can you state whether or not this abrasion was as recently as the bullet hole or whether it was made before or later or do you have any opinion on that?

A. I feel it was probably made earlier. At what time I couldn't determine.

Q. And that was based upon the fact that the scab, it was fairly well scabbed over?

A. Yes.

Q. You didn't find any of the bullet holes to be scabbed over, did you?

A. No, none of them.

Q. Doctor, would you step up to this torso for just a moment and point out the, each of the entrance holes that you have marked on the torso and any exit holes that have [fol. 1057] been placed on the torso.

A. Taking No. 1, this was the entrance hole here and the exit hole on the back as indicated here with an apparent line of—the bullet coming across in this fashion (indicating).

Q. Sort of sideways through the body?

A. Sort of sideways through the body. Taking No. 2, the entrance was in this position (indicating) and the bullet traversed the body through approximately the center and was found here (indicating).

Mr. King: Is that marked?

The Witness: I have it marked 2 and 3, both bullets.

Mr. Grinnell:

Q. With the corresponding marks of 2 and 3 on the other side so that they connect up?

A. This 3 came through there somewhat higher, through the body and also was relatively in the back of the chest and ended up in the same position, approximately the same position, in other words in this area (indicating) 2 and 3 here. No. 4 was more, went more to the back and that followed to the back bone here and as I said previously No. 5 also went to the backbone and I could put a probe in here and see it was in the same area as No. 4.

Q. And No. 5?

A. No. 5 was from this spot (indicating) again it went to the backbone.

. . . . . .

[fol. 1058] Mr. King: Yes, just briefly. (Questioning witness) Doctor, I was just slightly confused concerning the drawing here where you said 2 *and* 3, do I understand that both projectiles came out through that same hole?

A. No, they didn't come out, they were found immediately beneath the skin.

Q. Doctor, would you make a mark, a round mark and show that particular peculiarity.

A. They were laying in approximately this position (indicating on torso).

Q. In other words about half an inch apart?

A. Half an inch apart.

Q. And how deep?

A. Actually one had—this lower one had broken the skin. The skin was broken in this area. This had not quite broken the skin (indicating) but there was a definite bulging, you could feel there.

Mr. Grinnell: Does the ones that broke the skin show on the picture?

The Witness: Yes, it does, as a slight break.

Mr. Grinnell: Will you point that out where it actually broke the skin?

The Witness: Yes, this one broke the skin (indicating) and it was a slightly darker area.

Mr. King:

Q. You are indicating an area directly below the left arm pit, down below the line on the breast?

A. Yes.

* * * * * * *

[fol. 1059] Q. Now in probing No. 5 you did actually probe the wound, the bullet, No. 5, did you?

A. That is right.

[fol. 1060] Q. But you were not able to discover the bullet?

A. No, I didn't.

Q. Did you arrive at a direction from your probe, probing of the wound?

A. On that wound the bullet went from the side slightly back of the side.

Q. Would you indicate please, doctor?

Mr. Grinnell: Do you want to use this to give us the angle (handing pointer to doctor:)

The Witness: I would say approximately in this direction (indicating).

Mr. King:

Q. Now you are pointing in a direction which if it were continued would intersect the left breast about the midline of the left breast, is that about where you are indicating?

A. Actually no, it would probably come out below here (indicating).

Q. It would come out belong the left arm and just in front of the arm pit, is that about right, it would then just about come out on the edge of the left breast, is that correct, doctor?

A. If it were carried through.

Q. If it were carried through, from the way you probed it?

A. Yes.

Q. Now, doctor,——

The Court: Does this have to do with the introduction of the exhibit?

Mr. King: I just wanted to be sure I knew exactly which way these bullets had gone into this plaster of paris and [fols. 1061-1063] the doctor did indicate that. I can see no other questions are necessary.

The Court: I think for the record we should have the torso admitted as People's Exhibit next in order.

The Clerk: No. 35.

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[fol. 1064] STIPULATION AS TO VENUE

Mr. Mulkey: And I have one other matter. I understand Mr. King is willing to accept the stipulation as follows: That Mrs. Ferris, the shooting of Mrs. Ferris occurred in the Gridley Judicial District, County of Butte and State of California as heretofore referred to, is that right, Mr. King.

Mr. King: That is so, if the Court please, I don't request counsel to put on witnesses at this time to prove that fact, I will so stipulate.

The Court: All right, the stipulation is accepted.

Mr. King: That is that the altercation and shooting occurred in Butte County, is that the substance of that?

Mr. Mulkey: That is right, in the County of Butte and State of California.

. . . . . .

[fol. 1065] Doctor James Lowe Richardson, a witness produced on behalf of the People, having been previously duly sworn, testified as follows:

[fol. 1066] Cross-examination.

By Mr. King:

Q. Doctor, in order to get in to the written record here, the places where these projectiles entered the torso and the projectile that entered the head, would it require your notes to refresh your memory?

A. No, I don't think so, I think we can go ahead.

Q. If so I would postpone my questioning of you until your notes arrive. Now, will you describe for the purpose of the records the bullet hole that entered the head.

A. As I noted there were two in the scalp above the right ear.

Q. May I interrupt you, doctor, from your testimony I take it that there was only one bullet that entered the head, is that right?

A. There were two in the scalp, two bullet holes in the scalp, it was one bullet I presume.

Q. One bullet caused both of these, is that the idea (indicating)?

A. Yes.

Q. There was a fracture of the projectile and it caused one exit wound and one entrance wound, is that it?

A. That is the way I interrupt it.

Q. Would you describe for the purposes of the record just the part of the head where the bullet entered.

A. It was just in front and above the right ear.

Q. And about how far above the right ear?

A. Approximately two inches.

Q. And how far in front of the right ear?

A. Approximately between three quarters of an inch [fol. 1067] and one inch.

Q. That bullet coursed in a backward direction, meaning to the rear of the brain, is that correct?

A. Yes, it did.

Q. And it is your opinion now that that bullet, striking the skull, did fracture probably into two parts, one part going out through the one wound, the other bullet going in at just about the same place where there were two marks on the pictures of her skull, is that correct?

A. Yes, one going through the skull and then through the right part of the brain.

Q. But there is no difference of opinion at all, at this time, that it was all caused by one bullet in the head?

A. Not as far as I am concerned, I couldn't find any other bullet there.

Q. So we can assume from *the* that there was one bullet there?

A. Are you asking a question?

Q. Yes.

A. Yes.

Q. Thank you, doctor. Now also for the purpose of the record the bullet you have marked No. 1 which, referring to the torso here, and pointing, you have indicated that there was a hole above the left breast, would you describe that for the purpose of the record?

A. It was a round hole approximately a half inch in diameter and it was difficult to say whether the flesh at that point had been pushed in or not. I couldn't tell at the time whether that was a point of entrance or a point of exit. The wound was carried directly through the chest wall, through the lung, and out the back of the chest wall where a smaller hole was present. This one in back [fol. 1068] was approximately three fourths of an inch from the mid-line in the back on the left side.

Q. Of the back?

A. Yes.

Q. And that was the only one you did find on the back, is that correct?

A. No, there were actually two other marks, one other bullet wound and one other abrasion.

Q. And that was scabbed over as you testified on direct examination?

A. Yes.

Q. And was probably caused by something other than a bullet?

A. And sometime prior to that.

Q. And it was sometime prior to your examination?

A. Yes.

Q. Now what I am getting at is this, doctor, No. 3 or 4 or 2, these three holes that appear under the right arm and just below the arm pit, did you probe through each of those?

A. No. 2 as I think I have indicated, isn't that the one lower down and slightly in front?

Q. Yes.

A. Was very definitely a path through there. As I have indicated it went through the liver and its course actually was in the abdominal cavity at that time and it struck the spleen and was found resting over, as I have indicated, on the other side.

Q. Indicating, you mean by that you indicated on the other side where it came out?

A. On the left side where the projectile was found.

Q. Oh, you found it inside the body?

[fol. 1069] A. I found it inside immediately beneath the skin.

Q. There is a rib under No. 2, is there not?

A. Well, there are ribs, right, of course in that general area there *there* are ribs there.

Q. Did you notice whether the projectile had struck the rib?

A. No, it didn't apparently strike the rib. I have it it was carried through at the level of the six intercoastal interspace.

Q. Now when you probed through on No. 4, just immediately under the arm pit and—almost in the arm pit, would you say that was a correct description, doctor?

A. Yes.

Q. Did you probe through on No. 4?

A. That is the one I felt was carried through the back and struck the back bone.

Q. You didn't discover that projectile?

A. I didn't fine that projectile.

Q. Could that projectile have come out in the region of No. 1 in the back?

A. No, it didn't go through the back bone at all. There was nothing on the other side of the back bone. This No. 1, of the back, was carried directly through the chest wall, that was easily probed through there.

Q. No. 1 was definitely probed through?

A. Probed through at this point. (Indicating)

Q. And it came out at No. 1 on the back?

A. That is right.

Q. Now No. 5, I think it is here?

A. Yes.

Q. Could that have been caused by either one of those (indicating), referring to 3 or 4 or 2.

A. At the time of the autopsy I thought perhaps it had, in that both, as I said, at the time of autopsy, probing [fol. 1070] through, I can see a probe from the back where No. 5 is indicated there, coming at the fourth thoracic vertebra and also the hole here from No. 4 here (indicating) probing through in the same direction. I thought at the time of autopsy that the bullet had probably entered where I have indicated No. 4 here (indicating) and exited where I have indicated No. 5, having struck the back bone, reversed course and coming out the back.

Q. Now this No. 1—no, I was referring to under the left.

A. (Int.) There are 2 and 3 indicated there.

Q. Now they were exit wounds, were they, doctor? (Indicating on torso)

A. Actually they weren't exit wounds, the skin was broken at one point but the bullet had not come out, there were two bullets found immediately beneath the skin there.

Q. And from your probing you figured then that they came from either 3, 4 or 2?

A. I felt they came from 2 or 3, could have been 4, they were quite close together and there is some tissue damage there; but two bullets very definitely traveled from the right side of the chest through the various organs of the chest and ended up where I have indicated 2 and 3 on the left side.

Q. Well then, we are definitely sure there was a bullet hole where I am pointing No. 3—no, where I am pointing No. 4 and one where I am pointing No. 2 (indicating on torso) those are all entrance wounds as you looked at them? [fol. 1071] A. As I looked at them they were, yes.

Q. Now No. 1, did I understand you correctly to say that for a time you didn't know whether it was an entrance or exit wound?

A. That is right, at the time of the autopsy I didn't. However on examining the dress there is no corresponding hole in the dress in the back. The bullet apparently went through the chest wall just enough to get through but without enough force to even go through the dress, very similar to the bullet of the chest wall, so that the bullet would have had to have entered at No. 1 in front.

Q. Doctor, assuming this to be true, if one of these bullets, either 3, 4 or 2 had hit a bone, could it have been deflected away from its straight course or straight path?

A. Yes, it could.

Q. And could it have been deflected up into No. 1?

A. It could have been, but it wasn't.

Q. And what made you arrive at that conclusion?

A. Because the hole from No. 1, it carried directly through the chest wall, both in front, through the lung and out the chest wall in back. There is quite a direct line there.

Q. Now referring to 3, 4 and 2 again, doctor, and to 5 on the back, that 5 wasn't—excuse me, withdraw that. No. 5 now we take, is an abrasion?

A. No, that was a bullet wound. The abrasion was above that.

Q. Above that up in this region (indicating on torso)?

A. Yes.

[fol. 1072] Q. Indicating up towards the top of the shoulder?

A. No, not quite that high but above the wound.

Q. Now, doctor, from your examination, could 3, 2 or 4 have come through in this region and come out where No. 5 is?

A. As far as the examination on autopsy, yes. As far as examination of the dress, no.

Q. Are you saying there was no hole right over No. 5?

A. No, it was right over No. 1 in back.

Q. No. 1, well, I thought No. 1, Doctor, went through here and came out here (indicating on torso).

A. That is right, there was no hole in the dress over No. 1 in back.

Q. But there was a hole over No. 5?

A. There was a hole over No. 5.

Q. What my question went to is this, if the bullet had entered either 3, 4 or 2, could it have come out at 5?

A. Either 3 or 4, it could have from the autopsy examination, but not as I say, from the examination of the dress. All of these have powder burns around them, all the holes, I think.

Q. You say they have powder burns around them?

A. Yes.

Q. And there was no doubt of that, doctor.

A. Not in my mind.

Q. And you felt that there were powder burns around No. 5, two?

A. Around No. 5.

Q. And there were powder burns around No. 3, 4 and 2?

A. Yes.

Q. Now we are talking about on the flesh?

[fol. 1073] A. Not on the flesh, on the dress.

Q. Were there any powder burns on any one of the holes that you looked at?

A. I didn't see any powder burns.

Mr. Mulkey: (Int.) Would you tell me whether you were talking about the dress or body?

Mr. King:

Q. I am talking about the body.

A. On the body I didn't see any powder burns as such, I didn't do a micros-opic examination for it.

Q. You didn't x-ray for the lost bullet, did you?

A. No, I didn't.

Q. It would have shown up had you x-rayed the torso?

A. Had it been there, yes, it would have shown.

Q. And did you probe about, and you opened up the torso and you looked, deligently I take it, for that missing bullet?

A. Well, as I say I didn't think it was missing at the time of the autopsy because these two holes communicated and as I say I thought one was an entrance wound and the one at the time of autopsy in the back labeled No. 5, was the exit wound, so I thought at the time there had only been five actual bullet wounds or points of entrance.

Q. Now, doctor, using the pointer, could I ask you to describe for the record the elevation of the pointer in, corresponding to the torso, and have you place the pointer in the direction that this No. 1 bullet took so that we will

have it no- only in the record but I will have the mental picture of just the course that bullet No. 1 took.

A. From the position of the entrance and exit wound [fol. 1074] the course of the bullet was approximately in this direction (indicating).

Q. If you will step back a bit I will hold it and you put this down where it corresponds. (Demonstrating)

A. Yes, hold it slightly more in front and slightly down. Approximately there, I would say as near as we can tell.

Q. Could you describe it for the record, doctor, where the pointer is relative to the torso—would it be fair to say the pointer which is touching spot No. 1 on the left front chest is just a big off of level indicating that the bullet traveled downward as it progressed through the torso from the front of the torso to the back, say a quarter of an inch or would it be that much?

A. Just about that, just slightly more at an angle and it went from in a direction from left to right.

Q. Looking at the torso front-wise?

A. Yes, well, from, looking at it from all angles it went from left to right.

Q. Slightly from left to right?

The Court: That is from the torso, left to right, is that what you mean, doctor?

The Witness: From the body or from the torso left to right, yes, sir.

Mr. King:

Q. Now, would you indicate on the, from your probing on the No. 2, under the right arm pit, and indicate where that would come out?

A. Slightly downward and progressing definitely from right to left.

. . . . . .

[fol. 1075] Q. Now No. 4, doctor, which way did it course?

A. No. 4 coursed——

Q. (Int.) That was the one you couldn't find?

A. That was the one I didn't find.

Q. From the probing of the wound you felt it went almost level and directly in towards the backbone?

A. Slightly towards the back, yes.

Q. Putting the pointer on No. 3, which way did that course?

A. Approximately in this direction (indicating).

Q. Now that is indicating, is it not, doctor, just generally at slightly off of level and downward?

A. Slightly downward.

Q. May be half an inch where it came through on the other side?

A. Slightly more than that, two inches, it doesn't show on the torso but it does on the body.

Q. Now we have described No. 2, have we, well, perhaps we could do that again, No. 2.

A. No. 2 is more level, carried across the torso in this fashion (indicating).

Q. And No. 5 coursed which way?

A. In this direction (indicating) as you can see from [fol. 1076] that second photograph it is a longer wound and probably went in at an angle and probably at this angle (demonstrating).

Q. Did you probe the wound, doctor?

A. Yes, I did.

Q. And how far in did you go there?

A. Into the spine, into the spinal column.

Q. And in your autopsy did you cut in to see whether the bullet was in there?

A. Yes, I was there, I visualized the bone was fragmented but I did not see a bullet.

Q. Now what lies under No. 5 in the way of bony structure?

A. As far as the ribs?

Q. Yes.

A. The ribs right under there.

Q. Would you read from your notes there for the purpose of the record and place the rib that appeared just under No. 5.

A. I placed it at the level of the 7th rib posteriorly.

Q. Did it break the rib?

A. No, it didn't.

Q. It went between the ribs?

A. No, it didn't go between the ribs, it went in the fat and muscles of the back outside of the ribs until it hit the spinal column.

Redirect examination.

By Mr. Grinnell:

Q. Just a question or two, doctor. The basis of the autopsy, was it not, doctor, to determine the cause of death?

A. That was the primary purpose.

[fol. 1077] Q. And then in determining that your noted these wounds upon her body that you have testified to?

A. That is correct.

Q. And during the course of your autopsy you completed, it was apparent in an examination of the skin that there was something in this area here (indicating on torso), and you put your probe through there and you found those two slugs that you have already identified, because you say there were lumps just under the skin.

A. Well, actually I left those there, we knew they had to come from some place and by leaving them there and following them through from the point of entrance it was much easier to determine the course of the projectiles.

Q. But the purpose of the autopsy, doctor was not to take this body apart in an attempt to find all the slugs, was it?

A. No, we have a responsibility to the individual to do as little——

Q. (Int.) So you only recovered the ones which were readily apparent from your examination of the skull and where you saw these lumps under the skin, you didn't go on a fishing expedition inside her torso to find out what might have happened to those other two that might have hit the back bone?

A. No, I didn't.

Q. Now, doctor, I want you to look at those blown up large pictures on the top of the blackboard and I want to ask you, doctor, if the person standing over this person as we see her lying on the ground here in the two views, if a person standing over her as we see her in those two [fol. 1078] views, with a gun pointed down——

Mr. King: (Int.). Just a moment. I object at this point. I feel the District - is out of order in taking the gun to the blackboard and giving a demonstration of his own before this jury. I respectfully request that His Honor

admonish the jury to disregard the demonstration by the District Attorney.

The Court: You may proceed.

Mr. Grinnell: Thank you, Your Honor. (Questioning witness) That a person standing over the body in that position say, with the gun held about two to four feet away, that they could have fired a bullet into the body, into the back bone, in the general direct- that you have indicated, noting the position on the ground, into the body has you have indicated in this position.

A. I didn't indicate in that position, it was more from the side.

Q. More like this (indicating)?

A. Way around and from the position probably they would have to be in a crouch, not standing.

Q. The person would have had to have been crouching over the body?

A. Yes.

Q. But that shot could have been fired while the person was laying on the ground, with the gun held in that position—do you see the body in the picture (indicating)?

A. Yes.

Q. Is that possible, doctor?

A. I would say not standing over the body, it would have to be at one side and probably in a crouch.

[fol. 1079] Q. As you have indicated, doctor, when you examined this woman the first time you of course didn't examine her clothing, did you?

A. No, I didn't.

Q. However, did you meet with Mr. Mulkey and myself and Mr. David Burd in the crime labortory down in Sacramento a week or so before this trial commenced?

A. Yes, I did.

Q. And did you at that time examine the garment and in particular the bullet holes under a microscope or whatever you call that thing you look through?

A. Yes.

Q. And did you at that time observe the evidences of powder burns or grains of unburned powder or whatever is left around this hole by a gun?

A. There were powder burns around that hole which corresponded to No. 5 here.

* * * * * * *

The Witness: Yes, I did.

Mr. Grinnell:

Q. You say you did do that, doctor?

A. Yes.

Q. And it is your opinion then, is it not, doctor, that the hole that I am showing you in the dress, in the back of this dress corresponds to Hole No. 5 as you have indicated [fols. 1080-1082] on this torso and No. 5 on People's Exhibit second picture over, is that correct?

A. That is correct.

Q. And that hole definitely had—in the garment definitely from your person observation under the microscope powder burns around the outside of it?

A. Yes.

Q. Or unburned powder grains?

A. Unburned powder grains, yes.

Q. And it is your opinion is it not, doctor, at this time that Wound No. 5 in her back is a point of entrance?

A. Yes, it is.

* * * * * * *

[fols. 1083-1118] Discussion re Recalling Officer Spann

Mr. Mulkey: It was our understanding Mr. King wanted Officer Spann for further cross examination.

Mr. King: No, not now, Mr. Mulkey.

People Rest

Mr. Mulkey: Well, I give you that opportunity because at this point, if the Court please, the People will rest their case and Mr. King may now tell the Jury if he likes, what he intends to show by way of defense.

* * * * * * *

[fols. 1119-1120] Opening Statement by Mr. King on Behalf of Defendant

Now, coming down to the night of the shooting, Jack had seen Kay on Saturday afternoon, the day before, and out

at the tavern in Palermo. That I will remind you was the time when she came in there just before he showed up there and made the declaration about shooting and tapping her purse. He came in, they went out and had a talk. We will show you that they did make an arrangement to meet later that evening. We will also show you that Jack did go, as has been brought out here, to the Dog House and to the Little Shamrock, and that during the evening he had perhaps four or five drinks of beer. We will show you that he had been warned that Kay had been going around with other men or another man. We will show you that he didn't believe this, that he had never seen her with another man. We will show you that he went to Gridley in the early morning hours of August 3rd, that he was aware that Kay was at the dance. And we will show you, as this tape recording in the presence of the insurance agent said, that he went to find Kay.

. . . . . .

[fols. 1121-1127] (Thereupon Mr. McHugh showed slides on a screen as follows:)

. . . . . .

[fol. 1128] We will also show you that the reason he didn't come out and tell the officers, he had some maybe erroneous or silly idea that he had hit the man and that he might have to answer to another charge of a crime. We will show you that all during his questioning not once but over a dozen times or at least that many, ten to a dozen times, he asked to have a lawyer present and told the officers, "I'll tell everything just as soon as I can get my lawyer present, I'll tell you all". Now, we are going to show you that Jack Atchley did tell the truth when he talked to the insurance agent but he didn't know that that [fol. 1129] was being taken down. We will show you that was taken down by his friend. I mean, questions were asked by his friend and it was taken down by the sheriff's office. We will show you that before he knew anything at all about that tape recording taken by the insurance agent that he voluntarily told Mr. Anderson when he went to the mortuary that day that– he voluntarily told Mr. Anderson what had occurred there.

We will show you that the statements that he made to the officers at the time of his apprehension were partly true and partly false. We will show you the reason why he made those statements to the officers. We will show you that he was in a mental upset condition, as we all know a person would be. We will show you that the officers had kept him up and questioned him concerning the shooting for a long period of time, that he went almost two days and a half without sleep and that he was so groggy that he could hardly listen to the questions. We are going to show you that the mental age of this defendant isn't as high perhaps as some of the others of us. We will show you that he was exhausted and he did answer anything almost that came into his head. But putting what he said to the officers and putting the statement that he made to Mr. Anderson together I am sure that after the jury hears our evidence, both opinion evidence from the doctors and experts and from the lips of this defendant, that this jury can well make up their mind as to exactly the truth of what happened here. Thank you very [fol. 1130] much.

* * * * * * *

[fol. 1131] Mr. Paul Abreu, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. King:

Q. What is your name please?
A. Paul Abreu.
Q. And where do you reside?
A. 4927 Virginia Avenue.
Q. In this city?
A. Oroville.
Q. And you are a married man, Mr. Abreu?
A. Yes, sir.
Q. Do you have children?
A. Yes, sir.
Q. Now what is your occupation?
A. Tunnel miner.

Q. You work for whom?

A. Peter Keweit.

Q. And this job is right outside of town up on highway alternate 40A, is that correct?

A. Yes.

[fols. 1132-1133] Q. And do you have another trade other than that of a miner?

A. Oh, I am an automobile mechanic.

Q. That is your usual occupation?

A. No, miner is my usual occupation?

Q. But you do engage in auto mechanics occasionally?

A. Yes, on spare time.

Q. Now are you acquainted with Jack Atchley, who is seated here in Court?

A. Yes, I have known him.

Q. For how long?

A. Oh, I guess about, 1948 I think.

Q. 1948?

A. Yes.

. . . . . .

[fols. 1134-1135] Q. And to the best of your memory it was during the month of August and you don't know whether it was first part, middle part or last part of August?

A. It was the latter part of August.

Q. And did you hear a conversation, did you hear Kay make some declaration concerning the pink slip?

A. Yes, she said, "I got all of Jack's papers and I am going to fix his wagon good this time".

Q. I didn't understand.

A. She said, "I got all of Jack's papers, important papers and I am going to fix his wagon good this time".

Q. "Fix his wagon good this time"?

A. Yes.

Q. What other conversation was had?

A. That is all I heard at that time.

. . . . . .

[fol. 1136] Mr. King: (Int.)

Q. Let's fix it, please go along slowly so that we can get this straight, she called you at Mr. Turney's, on Mr. Turney's phone?

A. Yes.

Q. Now who was present then please?

A. Both Mr. and Mrs. Turney.

. . . . . .

[fol. 1137] Mr. King:

Q. Now you say you talked with her by phone at that time, what did she say to you or what did you say to her?

A. Well, she said that she had heard that knew a man who had a gun for sale and she would give me $10 if I would go buy it for her. I told her I didn't have nothing to do with guns and she asked me if I knew the man who had the gun and I said yes and she said, "I will be over to the yard and talk to you about it".

Q. Did she come?

A. She come right over.

Q. What transpired?

A. Well, she wanted me to go get the gun and I told [fols. 1138-1139] her I wouldn't have anything to do with guns.

Q. Did you ask her what she wanted the gun for?

A. No, I didn't ask at that time.

Q. Did you at any time have a conversation about guns?

A. About the fourth time she came over I asked what she wanted a gun for and she said she wanted to shoot Jack Atchley in the guts.

Q. She came right out with that?

A. That is what she said.

Q. In those words?

A. No, she said she wanted to shoot that son of a bitch Jack right in the guts.

Q. Did you ask her what that was all about?

A. No, I told her I didn't want to have anything to do with guns.

Q. Did she ever talk with you any further about a gun?

A. Yes, she called about two or three times afterwards, she was very persistent about the gun.

Cross-examination.

By Mr. Mulkey:

Q. Your last name was what, sir?
A. Abreu.

. . . . . .

[fol. 1140] Q. You used to go fishing with Sam and then your acquaintance with Jack has just been one of knowing who he is and seeing him around since 1948?
A. That is about all.
[fol. 1141] Q. And when did you first see or know Kay Ferris or Kay Atchley?
A. Oh, sometime in the month of August of 1957.
Q. August, 1957, in other words the first time you met her was the time that she came down to the Turney Garage, is that right?
A. Yes.

. . . . . .

[fol. 1142] Q. Did you have a phone conversation with her?
A. I talked to her on the phone about three different times.
Q. This was all within the last week of August, 1957?
A. Yes, phoned me right there.
Q. And from the first time you met her until the last time you saw her in August, 1957, did you see Jack Atchley?
A. Well, yes, I seen Jack Atchley the next day after she [fols. 1143-1145] told me she was going to shoot him.
Q. Did you tell him about this?
A. Yes, I told him about it.
Q. And what did he say when you told him about it?
A. He didn't say anything, just shook his head that is all.

. . . . . .

[fol. 1146] Q. You have been convicted of a felony, have you not, sir?
A. Yes, I have been convicted of a felony.

. . . . . .

Mr. Mulkey:

Q. What felony were you convicted of, sir?

[fol. 1147] A. Am I on trial?

. . . . . .

Mr. Mulkey:

Q. What felony?

A. I was transporting aliens into the United States.

Q. And you understood after the result of that you could not carry a gun at that time, isn't that right?

A. Yes, sir.

. . . . . .

[fols. 1148-1167] Q. Did you have any other or further conversation or occurrence or dealings in guns or threats or use of guns with relation to either Kay Ferris or Mr. Atchley after August, 1957?

A. No.

Q. Not to the present date?

A. No.

. . . . . .

[fol. 1168] Mr. King: I will call Mr. James Fuller.

James O. Fuller, called as a witness by the defendant, being duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

[fols. 1169-1170] Direct examination.

By Mr. King:

Q. Will you give your name please?

A. James Odel Fuller.

Q. Where do you live?

A. Palermo.

Q. How long have you lived there?

A. Approximately three years.

Q. What is your occupation?

A. Laborer, common laborer.

Q. Do you do any other type of work?

A. Carpenter work, mechanic work, all sorts of work.

Q. Do you know Mr. Jack Atchley?
A. Yes.
Q. How long have you know him?
A. Well, I would say two years or better.
Q. Were you ever employed by him?
A. Yes.
Q. For how long?
A. Well, I would say around three months, something like that.
Q. When was that?
A. Well, I don't recall the date. It was last year around —well, I would say around July of last year and before.

* * * * * * *

[fol. 1171] Q. Were you ever in the home at Palermo where Jack and Kay lived?
A. Yes, sir. I been there several different times.
Q. In your employment for Mr. Atchley did you have occasion to do any work about the houses?
A. Well, that was my job when he was there was building the houses, doing work on the houses.
Q. There are three houses there?
A. Yes.
Q. There is one house to the east that is called the big house, it is a little bit larger than the other two, which lie to the west?
A. That's right.
Q. Those houses you say you built at what time or helped build?
A. Well, it was in '57. I don't recall just the month.
Q. Recalling to your attention deer season of that year were you working on the houses about that time?
A. Yes, sir, I was working on the houses, at that time.
Q. Recalling to your attention something that occurred shortly after you came back from deer hunting at that time would you tell the jury just what did occur between Jack and his wife Kay?
A. Well, I came down one morning to go to work and they was seeming to have a little confusion between them and they were sitting on the couch and the next thing I noticed she had a gun and Jack reached for the gun and in the struggle the gun went off and one shot went through

[fols. 1172-1174] the window. By that time as quick as the gun occurred, why, I tried to get out of the house and I went out the front door.

Q. Did you hear a conversation at that time between Jack and Kay?

A. Well, the only thing I heard I noticed was him trying to get the gun and told her that that was crazy trying to shoot. That's the only thing I heard in the words of conversation between them. After I started to leave, after the gun was pulled.

Q. But what were they discussing before the gun was pulled?

A. Well, the argument seemed to have occurred over the other woman. What was her name? That lived there——. The woman that lived in the trailer.

* * * * * * *

[fol. 1175] Q. Can you recall anything unusual about a high powered rifle in relation to Kay or Jack?

A. Well, one time I know that he came in and——.

Mr. Grinnell: Just a moment. One time?

[fol. 1176] Mr. King: I will fix it in just a moment. We will have to narrow the time down.

Q. What time was it?

A. It is shortly after we had—I will say a few days after we had went deer hunting he came in one afternoon and parked his car right at the end of Jewel's trailer and laid down in the car.

Mr. Grinnell: Was this sometime in September of '57?

Mr. King: That is correct.

The Witness: That's right, '57. And she came out there with the rifle, .30-30, and pulled the door open and says, "You son of a bitch, you are either going in the house or you ain't a-going nowhere. They are going to haul you off and—" taken him out of the car and taken him in the house.

Q. How did she make that statement? In the tone of voice that you used or differently?

A. Well, quite a bit different if you want it plain.

Q. What do you mean by that?

A. Well, the words she used. She used more vulgar language than I did, than I said Kay did when she told him that.

Q. I hate to ask you to use vulgar language in the presence of this jury but I would like to know what she called him and what she said to him.

A. Well, as I said there, she said, "You son of a bitch, you are going in the house and stay with me. You are not going nowhere with that slut." She said, "You will either live with me or you won't go nowhere."

Q. How was she handling the gun at the time?

A. Well, she had the gun in her right hand and opened [fol. 1177] the car door on the driver's side with her left and right then she had the gun in her right hand pointed towards Jack when she told him that.

* * * * * * *

Q. Recalling your attention to a time immediately before you went to the deer hunt did you have occasion to see Jack and Kay in the tavern nearby?

A. Yes, sir.

Q. What was that occasion?

A. Well, Jack was in there and Kay came in and Jewel, [fol. 1178] she was already in, and Jack he come in, was sitting there, him and I was talking, and Jewel was sitting clean at the east end of the bar and Kay come up and, oh, I would say, four or five stools behind Jack, and sit down. And Jack went over and was talking to her and she started —or said she was going to get Jewel. And Jack, he tried to talk her—try to talk to her that she didn't want to do that. And she had an ice pick in the bosom of her dress and she pulled out that ice pick and said, "I'll either get you or her." She said, "If you are going to hold up for her," she said, "I'll get you."

Q. What more was done or said?

A. Well, her and Jack went outside and I don't know. I didn't go outside of the building.

Q. Do you know what time Jewel left the country?

A. No, sir, I don't.

Q. Is the big trailer house still there?

A. No, sir.

Q. How long has it been gone?
A. Well, she taken the trailer house with her.

. . . . . .

[fol. 1179] Q. Would you tell the jury just what happened on the occasion that you saw Jack taking his belongings to his car?

Mr. Mulkey: Just a moment, Mr. King. Can you please have a time of these things? I think the jury would like to know.

Mr. King: I will try to fix it for you, Mr. Mulkey.

Q. Could you fix the time of that? What time did you see him go out with his clothes to the car relative to——. Now, I am calling your attention——. Maybe we can do it this way: Relative to the incident of the ice pick in the tavern was it before or after that?

A. It was after.

Q. How long after?

A. Oh, I would say something like a couple of weeks afterwards.

Q. Then that would be sometime along in the summer of 1957?

A. Yes, sir, still in '57, in the summer '57.

Q. Could you fix the date a little bit more closely? In which month?

A. The best I remember it was in November.

Q. It wasn't in the summer? It was in November?

A. Well, in the fall of the year.

Q. In November of '57?

A. I am pretty sure that it was.

Q. What was that occasion?

A. Well, he taken his clothes, him and her, I don't know——. At first they probably seemed to have had an argument and he taken his clothes and put them in the car.

[fol. 1180] Q. Where were you at that time?

A. I was right there, right at the big house just where he had his car up in the driveway.

Q. Do you recall what you were doing at that time?

A. Yes, sir.

Q. What were you doing?

A. I was working on a car putting a clutch in a car for him at the time.

Q. What did you hear and see?

A. Well, I really didn't hear nothing—that is, none of their quarrel or whatever it was. The only thing I seen that he put his clothes in the car and locked his car door and she broke out the window right out of his car and taken his clothes and put them back in the house. And she said he was aiming to stay, he wasn't going nowhere.

Q. You mean she broke the window out of the car?

A. Yes.

Q. You mean she broke the glass out of the car?

A. Yes, side glass.

Q. What was her language when she told him that he was going to stay? Was that all she said at that time?

A. Well, she said, "You son of a bitch," she said, "you going to stay," she said, "you are not going nowhere with that bitch."

Q. Do you know to whom she was referring?

A. Well, I wouldn't say for sure but I figured Jewel.

Q. At that time did you have a conversation with Jack?

A. No, sir.

• • • • • • •

[fols. 1181-1202] Q. Mr. Fuller, I am going to have to ask you the question. Have you ever been convicted of a felony?

A. Yes, sir.

Q. What was that felony?

A. Assault with a deadly weapon and intention to do great bodily injury.

• • • • • • •

[fol. 1203] Recross-examination.

By Mr. Mulkey:

• • • • • • •

[fols. 1204-1205] Q. Did you call the police on this occasion when the gun incident occurred?

A. No, I didn't.

Q. Wherein it went off?

A. No.

Q. Did you call the police in the tavern when Kay pulled the ice pick?

A. No, I didn't.

Q. Did you call the police when Kay pulled the .30-30?

A. No.

Q. Do you know if anyone else called the police on these occasion?

A. I don't know if they did or not.

Q. But you didn't?

A. That's right. One thing I wouldn't call is a police on no one.

* * * * * * *

[fols. 1206-1213] Ross TURNEY, called as a witness by the defendant, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * * * *

[fols. 1214-1215] Cross-examination.

By Mr. Grinnell:

Q. You indicate that you have known Mr. Atchley for some time, is that correct?

A. That is correct.

Q. About how long have you known Mr. Atchley? I am referring to the defendant Jack Atchley.

A. About four or five years I would say.

Q. And has that been a business relationship?

A. Yes.

Q. Jack dealt in secondhand or used cars, did he not?

A. Yes.

* * * * * * *

[fol. 1216] Q. Now, prior to June of '57 then you did not know Mrs. Atchley?

A. Not as Mrs. Atchley.

Q. As anyone?
A. I met her as Kay Ferris.
Q. Where did you meet her?
A. I met her at my place.
Q. Before she bought the Willys station wagon?
A. Yes, I believe it was.
Q. How did you happen to meet her?
A. Well, she come over with Jack.
Q. She came over with Jack to your place of business?
A. Yes.
Q. And that is how you met her then is with Jack?
A. I believe it is.
Q. Was that before she bought the Willys station wagon?
A. Yes, it was.

• • • • • • •

[fols 1217-1218] Q. Now, are these incidents that you have related regarding the desirability of purchasing a gun before they were married or after they were married?.

A. I wouldn't know that.

Q. Well, if I were to tell you that they were married in December of '57 then would you fix these incidents about the desirability of purchasing a gun before or after they were married?

A. Well, I would have to guess. I would say before.

Q. In other words, the events that you have related here all took place then as far as you know before they were married in December of '57, is that correct?

A. I would assume that, yes.

Q. Well, don't you know it to be a fact?

A. No.

Q. You don't remember then when these things were said?

A. I don't remember the exact dates, no.

Q. I am not asking you for exact dates. I am asking you if you remember about when they were said. Certainly you can remember whether it was said before December or after December of '57.

A. I said that I thought they were before December.

• • • • • • •

[fols. 1219-1240] Q. Never asked for a gun or mentioned a gun after they were married, did she?

A. Not that I know of.

. . . . . .

Q. Did she ask you whether or not you would secure a gun for her?
A. Yes.
Q. When did she ask you that?
A. About the time that she asked me if I had a gun?
Q. And this was before she married Mr. Atchley?
A. Well, it was before December.

. . . . . .

Q. If I understand you correctly then somewhere around from June of '57 to December '57 prior to their marriage, somewhere in that period of time, she asked you, first of all, if you had a gun for sale and, second of all, if you would procure a gun for her?
A. Yes.

. . . . . .

[fol. 1241] Mr. Denny DeCamp, a witness produced on behalf of the defendant, after being first duly sworn, testified as follows:

Direct examination.

The Clerk: May I have your full name please?
The Witness: Denny DeCamp.

Mr. King:

Q. Mr. DeCamp, where do you live?
A. Palermo.

. . . . . .

[fol. 1242] Q. Yes, are you acquainted with Jack Atchley who is seated here in the Courtroom?
A. Yes, I am.
Q. And how well do you know him?
A. Pretty well.
Q. Have you been friendly with him?
A. Yes.

[fol. 1243] Q. Did you know Kay, his wife?
A. Yes, I did.
Q. Do you know how well?
A. Pretty well.
Q. Were you friendly with her?
A. Yes, I was.
Q. Now calling your attention to the summer of 1957.
A. Yes.
Q. Does that recall to your mind anything about Jack and Kay?
A. Yes, it does.
Q. And in particular where were you working at that time?
A. Well I was working for Jack.
Q. And what were you doing?
A. Building houses.
Q. And was that out on the Thermalito property where there are three little houses there?
A. Palermo property.
Q. And there are three little houses there?
A. Yes.
Q. Where was Jack living at the time when you were working on the houses?
A. He was living in the trailer house.
Q. The other house had not been finished completely is that it?
A. The other house, one of the other houses was completed.
Q. Who was living in that house, if you remember?
A. Well, for a while Jack and Jewel lived in it.
Q. Jack and Jewel lived in it?
A. Yes.

. . . . . .

[fol. 1244] Q. And you say Jewel and Jack were living in one of the houses?
A. Yes, they were living in one of the houses?
A. Yes, they were.

. . . . . .

Q. Well, if I would call your attention to the fact some of the houses were larger than the others, would that help you out?

A. Well, it would be the big house.

Q. It is a little bit bigger than the other houses, is that it?

A. Yes.

Q. And it was called the big house, wasn't it?

A. Yes.

Q. And it was the house that was originally completed first, is that right?

A. Yes, it was.

Q. What were you doing, were you working on that house or on the other two houses?

A. I was working on the other two houses.

[fol. 1245] Q. And those are the smaller houses that are immediately to the west of the big house, that is true, isn't it?

A. Yes.

Q. What kind of work were you doing there?

A. Carpenter work.

* * * * * * *

[fols. 1246-1253] Q. Yes, by the way did you know Jewel quite well?

A. Pretty well, yes.

Q. You would see her frequently around in the big house, would you?

A. Yes, I would.

Q. And how big a girl was she?

A. She was, I would say she was about 5 foot 2 and weighed about 110 pounds.

Q. How tall are you?

A. About 5 foot 5.

Q. She was a little shorter than you are then?

A. Yes, quite a bit.

Q. While we are talking about that, how tall was, if you know, how tall was Kay?

A. Well, I would say she was about 5 foot 7, she weighed about 160 or 165 pounds.

Q. Now going back to the time that Kay and Jack were living in the big house at Palermo, were you around the premises there frequently?

A. Yes, I was.

Q. And how frequently?

A. Well, just about every day.

Q. Were you working every day for him or what was it?
A. I was working every day for him.
Q. At that time?
A. Yes.
Q. And that would be in what month of 1957?
A. That was June and July, 1957.
Q. Yes, now were you ever present when anything untoward happened between Jewel and Kay?
A. Yes, I was.

. . . . . .

[fol. 1254] Mr. King:

Q. Now who else was present, if anyone?
A. Well, Mr. Chase was present at one time.
Q. Are you sure that he was there that time?
A. I don't know whether he was there that time or not, that one time, but he was out there several times when I was there.
Q. Yes.
A. I don't know who else was there, it was a business place and there was lots of people there at different times to pay Jack money that they owed him.
Q. Now did you ever hear Kay make any threats concerning Jack?
A. Yes, I did.
Q. What is that again?
A. Yes, I did.
Q. Speak up please, Mr. DeCamp. When was the first time that you heard her threaten him?
[fols. 1255-1256] A. Well, the first time was when she told me that she went down to Blackie's Exchange here in Oroville and tried to buy a gun to kill him with.
Q. What day was that, what time was that?
A. That was in July, 1958.
Q. And who was present at that time?
A. Well, if there was anybody present at that time, I don't know, but there was somebody out talking to Jack at the time in the car and I didn't see him when I drove up there and I asked Kay where Jack was and that was when she told me.
Q. What was the substance of that conversation?

A. Well, I just asked where Jack was and she said a few cuss words and told me he was out there in the car, that she had went down to Blackie's to try to buy a gun and they wouldn't let her buy one because she had a certain period of time to wait for a gun because they wouldn't let her have one.

Q. What did you say about what she was going to do with a gun?

A. She said she was going to kill him.

Q. Did she say anything further?

A. She said she wanted to see the blood run.

Q. Did she say anything further at that time about how she was going to kill him?

A. Well, she just said she was going to shoot him.

Q. Did you ever hear her mention any other threats?

A. Well, I had heard her threaten him several different times.

. . . . . .

[fols. 1257-1263] Mr. King: I was going to ask it, Mr. Mulkey, a little later, but I will ask it right now. (Questioning witness) Did you ever talk to Jack about any threats that Kay might have made?

A. Yes.

Q. And on how many times?

A. Well, one time that I know of.

Q. Yes, what did you say then and where were you at that time?

A. We were sitting in my car in front of his house.

. . . . . .

[fols. 1264-1270] Cross-examination.

By Mr. Grinnell:

. . . . . .

[fols. 1271-1274] Q. In any event it is fair, is it not, to say that soon after Kay arrived that things disintegrated rapidly as far as Jewel was concerned, is that correct?

A. Yes.

Q. And that Jewel was replaced by Kay?

A. I guess you might call it that.

Q. Well, isn't that the fact?

A. I guess so.

Q. Well, naturally being in a relationship like that the two women didn't particularly care for each other, did they?

A. No.

Q. They were both, would you say, striving for the attention of Mr. Atchley?

A. I wouldn't say that, no.

Q. What would you say, would you not say they were competitors for his affections?

A. Yes, I would think so.

Q. And ultimately Kay won out?

A. Yes, she won out.

. . . . . .

Q. And eventually she married him, is that right?

A. Yes.

Q. So far as you know you say you saw the marriage certificate?

A. Yes.

Q. Now then, any animosity between the two women that you might have happen to observe, could have been explained because they were both interested in Mr. Atchley?

A. Yes, they were.

. . . . . .

[fol. 1275] Q. Do you know whether he was giving her back her own money or giving her money of his own?

A. I don't think he would have to ask for somebody else's money, I didn't see him when he didn't have plenty of money.

. . . . . .

[fol. 1276] Q. Mr. Atchley was in the used car business, was he not?

A. That is right.

Q. And he went out of that used car business about when?

A. I don't know for sure, I would say about April of 1958.

Q. April of when?
A. 1958.

* * * * * * *

Q. Was it your impression and your understanding that when he went out of the car business that he went over to the Gridley area to work on a farm?
A. Yes, I knew he went over there and worked on a farm.
Q. To work as a laborer on a farm?
A. He thinned peaches over there.
[fols. 1277-1278] Q. Thinning peaches, I assume that is on a farm?
A. Yes.
Q. Then, can you tell us why a man with successful business as you have indicated with all of this money would give this up and go thin peaches?
A. He didn't go thin peaches right after he went out of business, it was quite some time after that.

* * * * * * *

Q. Did Mr. Atchley ever tell you why he went out of his successful business then?
A. No, he didn't, it was none of my business.

* * * * * * *

[fols. 1279-1281] Q. Did you understand from your contact with Mr. Atchley that he was the father of one of these five children?
A. Yes.

* * * * * * *

[fol. 1282] Q. You never saw her with a gun, did you?
A. Not actually, no.

* * * * * * *

[fols. 1283-1291] Q. But you never saw her, did you, Mr. DeCamp, put into action any of these threats or vulgar or filthy language as you have called it?
A. No, I didn't.
Q. She did a lot of mouthing off?
A. Yes.

Q. As you say. But you never saw her put any of it into action, did you?

A. No.

* * * * * * *

[fol. 1292] Mrs. Gertrude Edsinger, a witness produced on behalf of the defendant, after being first duly sworn, testified as follows:

Direct Examination.

The Clerk: May I have your name please?

The Witness: Gertrude Edsinger.

Mr. King:

Q. Will you step this way please, Mrs. Edsinger, and be seated in this chair. Would you spell your name please?

A. E-d-s-i-n-g-e-r.

Q. And your first name is Gertrude?

A. Gertrude.

Q. Where do you live Mrs. Edsinger?

A. 367 Nevada Street, Gridley.

Q. Now at this time I am going to ask you in that neighborhood who is your neighbor across the street?

A. Directly across the street is Mrs. Butler.

Q. And the next house up the street north?

A. Was the Atchley house.

Q. And the next house up the street on the same side?

A. Is the Scharsch home.

Q. Yes, what is your occupation, Mrs. Edsinger?

A. I do office work.

[fol. 1293] Q. Who do you work for?

A. Charles King of Gridley.

Q. And who is he?

A. He is a Gridley Attorney.

Q. And he is my brother, is he not?

A. Yes.

Q. And he has a law practice there and you do work for him in his law office?

A. Yes.

Q. You do secretarial work for him there?

A. Yes.

* * * * * * *

Q. Now did you hear or see anything untoward happen in the early morning hours of August 3rd, Sunday morning and while you were at your home?

A. Yes, I did.

Q. And what did you see or hear, first what did you hear? [fol. 1294] A. I was awaken by some loud noise. I don't know yet what it was and I got up and went to the front door to look out and——

* * * * * * *

[fol. 1295] Q. In other words you had gone back to sleep in the intermission between the fire and the unusual noise, now again, what did you hear?

A. I don't know what I heard or I don't know what awoke me but when I woke up I could hear a loud voice so I went to the front door to look out.

Q. And did you hear anything else?

A. Yes, as I almost reached the door I heard a series of shots which I didn't know were shots at the time.

Q. What did you think they were?

A. I thought they were firecrackers.

Q. You thought it was a string of firecrackers going off?

A. Yes.

Q. Could you use your voice, I know you can't exactly describe the noise but would you use your voice and say just about what you thought you heard.

A. Yes, it was bang-bang-bang, bang-bang-bang. There was a pause in between.

[fol. 1296] Q. Now you say you heard that just as you were opening the door?

A. Just before I got to the door.

Q. Now as you opened—it is a screen door on your house, isn't it?

A. Yes.

Q. Now as you opened the door what did you see?

A. I saw some one walking down the street fast and looking back over their shoulder and when I unlatched the screen to step out I wanted to make sure they went on past the house, and they turned and looked at me and kept on going and I went back in the house and went back to bed and went to sleep.

Q. Now you said somebody, "Walking fast."
A. Yes.
Q. What do you mean by that?
A. Well, they were taking long steps and fast steps.
Q. Where they running?
A. No, they weren't running.
Q. Did you see the individual actually break into a run?
A. No, I didn't.
Q. But it wasn't—was it just an extremely fast walk?
A. It was a fast walk and long steps.
Q. And the steps were being taken very rapidly?
A. Yes.
Q. That is correct, is it.
A. Yes.

. . . . . .

[fols. 1297-1311] Q. Can you at this time tell the jury what your impression was of the individual that you saw there, was he fat, stout, thin, or what was he, what was the appearance of the individual that you saw there at that time?

A. My memory is that he was a stocky built person of perhaps medium height.

. . . . . .

Q. Did you see how the individual was dressed?

A. Well, he had on medium colored clothes, his shirt was lighter than his trousers and I had the thought that he wasn't dressed up.

Q. Well, you say you had the thought he wasn't dressed up, you mean he didn't have a suit on?

A. That is right.

Q. How about the rest of him?

A. He had no coat and no hat and that is all I can tell you.

. . . . . .

[fol. 1312] Q. What particularly did you notice about the individual as he went down there?

A. He was walking fast and looking back.

Q. Which way was he looking back?

A. This way.

Q. He was looking back to his left?
A. Yes, looking backwards.

. . . . . .

[fol. 1313] Q. How was he looking? I would like to have you show the jury with your own head how he was looking?
A. Well, every step he was turning and then he would turn back again and then he looked to where he was going, and turned back again frequently.
Q. You say you opened the screen door?
A. Yes. It was latched. I unlatched the hook.
Q. And then what if anything did the individual do?
A. He turned his head in my direction. He heard me unlatch the hook and turned his head in my direction. He knew I was standing there.
Q. And he kept going on down the street?
A. He didn't break his pace. He kept going at the same speed.
Q. Do you know that there is a difference between a fast walk and run?
A. Yes, I do.
Q. Would you say anything about that in that regard, talking about his speed?
A. He wasn't running, but he was walking with long steps, and rapid steps. But he wasn't running.
Q. You say the individual was a husky individual?
A. Yes. He was stocky built person.
Q. Did you have occasion to look at his haircut or hair?
A. Well, I know he didn't have a hat. I thought when I saw him he might be a teen-ager. I don't know why but I thought that.
Q. Will you explain the kids had been fooling around the neighborhood? Would you go into that a little bit further? What do you mean by the kids being around the neighborhood?
[fol. 1314] A. Well, in particular this Atchley home was a noisy——
Q. I can't hear you.
A. It was noisy, people in and out, cars in and out quite a lot of the time and a lot of loud talking. I just thought they are having a party and it was breaking up and one of them was going home.

Q. That was your first impression?

A. That was what I thought until 10:00 o'clock the next day.

Q. Then you found out there had been a shooting over there?

A. I phoned one of the neighbors and asked them what all the—what the commotion was about on the street.

Q. Now, calling your attention back to the haircut, would you be kind enough to tell me what sort of a haircut the individual had?

A. Well, I thought he had a flattop.

Q. What do you mean by flattop?

A. Well, all of the boys were——

Q. You mean a butch?

A. A butch, yes.

Q. That was your impression at that time?

A. Yes.

Q. Of course you didn't at that time know there was a shooting?

A. No, I didn't.

Q. Now let's go a little bit further. Did you after you found out about this shooting on Sunday morning talk to anybody about it?

A. Well, I didn't that day. I talked to a couple of people that day. That day I only talked to a couple of people, but the next day—and, of course, the following week or two—I talked to several people.

[fol. 1315] Q. The next day did you have occasion to mention the fact that you saw an individual going south to anyone?

A. I told everyone when we discussed the shooting. I told everyone I talked to that I had.

Q. Calling your attention in particular to anyone at the office when you went to work that day did you tell anybody about it?

A. Yes, I did.

Q. Who did you tell?

A. I told both Mr. and Mrs. King.

Q. Mrs. King works in the office there with you, does she not?

A. Yes, she did.

Mr. Mulkey: Are you going to use this picture any more, counsel? I would like the jury to be able to see the witness.

Mr. King: You may turn on the lights again, Mr. Bailiff.

The Court: I assume that you will want the screen there and the projectionist for the purposes of cross examination.

Mr. Mulkey: Yes.

Mr. King:

Q. Now, you did tell Mr. Charles King?

A. Yes.

Q. And what did he say to you?

A. He said I should make a report to the Gridley police department.

Q. Did you do that?

A. No, I didn't.

Q. What did you do?

A. I told him I didn't want to get mixed up in it and that I wasn't going to do it.

[fol. 1316]. Q. Well, what did he do?

A. He said that I should for my own protection. I waited two or three days and then I told him that if he wanted to make the report he could make it but I didn't want to. And he made the report for me.

Q. He did make the report for you?

A. Yes.

Q. Do you know who he reported it to?

A. He told me it was Leroy Main.

Q. Constable Main?

A. Yes.

Q. In the Gridley police department?

A. Yes.

Q. Do you recall my coming to your residence?

A. Yes, I do.

Q. I have talked to you on a couple of occasions?

A. Yes.

Q. When we came back with the photographer. But when I came to you, to your place the first time, did you tell me about what had happened?

A. Yes, I did.

Q. But did you tell me in response to my query whether or not anybody else had been to your house to talk to you about it?

A. Yes.

Q. What did you tell me?

A. No one had been there.

Q. No one had come to your house to talk with you about it?

A. No.

Q. Then when did anybody else other than myself come to your house to talk with you about it?

A. It's been about two weeks ago.

Q. Who came then?

A. An officer named Tamagni.

[fol. 1317] Q. And you told him what happened, did you?

A. I told him the same thing I told you.

Q. What you told this jury?

A. Yes.

Q. And then calling your attention to just the other day, last Friday, did you have occasion to see anyone else?

A. It is on Thursday an officer named Brush came to the house again on my lunch hour.

Q. Did you discuss the case with him?

A. Yes. He asked me and I told him the same thing as I told you and that I told Mr. Tamagni.

Q. The same thing you told my brother even on that first occasion?

A. Yes.

Q. Did you have occasion to tell any business group of girls, a business group, anything about this?

A. Well, yes. This was before Mr. King had made the report to the police department. The secretaries from Millington's.

Q. That is Lawyer Millington in the same town of Gridley?

A. Yes. They were getting after me because I hadn't made a report of it, said I should have done it.

Q. That you should have reported it?

A. Yes. I told them I didn't want to get mixed up in it. And that was before Mr. King made the report to the police department.

Q. But he did make that report for you?

A. Yes, he did.

Q. Do you know who the person was that you saw going down the street?

A. No, I don't.

Q. Could you identify him if you saw him?

A. No, I am sure I couldn't. I wasn't trying to identify [fol. 1318] him.

Q. You didn't give it that much importance?

A. No, I didn't. I looked and saw that he was going on and thought he was . . . they were going home, and the noise would quiet down, and I went back to bed and went to sleep.

Q. Did you think to look north on that street?

A. No.

Q. Up towards Mrs. Thomas' house?

A. No, I didn't.

Mr. King: You may cross examine.

Cross-examination.

By Mr. Mulkey:

Q. Now, what was it on this night that first woke you out of your sleep?

A. I don't know. It was a loud noise. But I don't know what it was. After I awakened I heard loud voices.

Q. Can you characterize the noise in any way for us?

A. I thought it was voices, but I am not sure.

Q. Can you characterize it as women's voices or men's voices?

A. (Nodding negatively)

Q. Or a man's voice?

A. (Nodding negatively)

Mr. King: Did I hear an answer to that?

The Witness: The answer is no.

Mr. King: To all of those questions the answer no? I didn't hear you.

The Witness: My answer was no to whether I could characterize it as a man's voice or a woman's voice.

Mr. Mulkey: Are you finished, counsel?

Mr. King: I just wanted to know. I couldn't hear her.

[fol. 1319] Mr. Mulkey:

Q. You heard this noise whatever it might have been?

A. Yes.

Q. And you were in bed, which is in a room adjacent to the front room?

A. Yes.

Q. And the front door being on the front room, I take it?

A. Yes.

Q. Did you get up then?

A. I got up.

Q. Did you put on your robe?

A. No. I put on my slippers.

Q. Put on your slippers. Did you put on your robe?

A. No.

Q. You went to the door?

A. Yes.

Q. Did you step out the door or did you stay in the doorway?

A. I only took one step out just so I could watch to make sure he kept going up the street.

Q. Otherwise when you first saw this gentleman you were actually standing, I take it, on the threshold of the doorway with the screen perhaps held out with one hand?

A. The screen was still hooked when I first saw him and closed.

Q. Had you seen him through the screen?

A. Right.

Q. Then you unhooked it?

A. Unhooked it.

Q. And opened it up?

A. Took a step out.

Q. And when you say a step you mean just like this (demonstrating)?

A. Yes.

Q. You left the other foot on the threshold of the door?

A. I didn't want to go out too far.

[fol. 1320] Q. You wanted to stay in your house?

A. Yes.

Q. Until you knew what this was all about?

A. Yes.

Q. And you looked again at this gentleman, is that right?

A. I kept watching him.

Q. Did you watch him until he went out of view by this bush that appeared in that last photograph? It seems there is a large bush to the right of your doorway as you stand in it.

A. Still further to the right is a walnut tree and I watched him through the walnut tree until he got past that still further to the south.

Q. About how far past your house would that be?

A. 20 or 25 feet perhaps.

Q. I see. Then you would have watched him you say 20 to 25 feet past your house. Do you mean 20 to 25 feet past the doorway of your house where you saw him or 20 to 25 feet past the right side of your house as you stand in front of it?

A. Past the right side. He would have been beyond my vision if I had not stepped out. By stepping out I could see him that much further on.

Q. Now, as I stand here let's say I am in the doorway of your house. This man was going in this direction?

A. He was going south, yes.

Q. And you viewed him for a distance of about 25 feet beyond the right edge of your house as I stand in the doorway of it?

A. Yes, beyond the range of my vision, yes.

Q. How long did this observation take?

A. Just a minute. Very short time.

[fol. 1321] Q. Then what did you do? Step back in the house?

A. I stepped back and hooked the screen and closed the door.

Q. And did what?

A. Went back to bed.

Q. And went back to bed. Then the man could have come right back in the front of your house and you wouldn't have known it?

A. He could have, yes.

Q. It only took a matter of seconds for him to get by?

A. That's right.

Q. And then you went back in the house and forgot about it? You didn't forget about it but you were not concerned about it any more that night. Now, you heard these voices. You heard something that awakened you and then I be-

lieve you stated you heard bang, bang, bang, pause, bang, bang, bang. Is that about right?

A. Just before I got to the door.

Q. Just before you got to the door. Did you have any impression of where the bangs came from?

A. Well, at the time I thought it came from the Atchley house. I knew there was a commotion going on there and I thought that's where it was from.

Q. Had this commotion been going on all evening?

A. I was listening to the late television show and I don't know.

Q. Then your first impression of the commotion was when you awakened?

A. When I was awakened, that's right.

Q. You never did view the front yard or where the Atchley house is even after you woke up?

A. No; I didn't.

[fol. 1322] Q. So you are not even certain right now that whatever commotion there was that it took place in the Atchley yard?

A. No, I am not.

Q. As you have indicated on counsel's photograph here this man was on your side of the street, is that right?

A. A little, yes. I thought so, yes.

Q. And was proceeding south?

A. South.

Q. And was walking fast?

A. Yes.

Q. He wasn't running?

A. No.

Q. Did he have anything with him?

A. I don't believe he had.

Q. Were his hands in his pockets or out of his pockets?

A. I think they were out.

Q. Out?

A. Out.

Q. Was his shirt in his pants or out of his pants? Do you know what I mean? We have these sport shirts that men wear out of their pants and sometimes——

A. I would say in.

Q. You would say in his pants. You are certain of that?

A. I am certain, yes.

Q. Did he have a coat on?
A. No, he didn't.
Q. Would you say his shirt was lighter than his pants?
A. Yes.
Q. And his pants were not the dress up type?
A. No. I didn't think he was dressed up.
Q. Could have been blue jeans perhaps?
A. If they were quite faded it could have been. They were about a medium color. I had the impression of [fol. 1323] medium colored trousers and a light colored shirt.
Q. How was the lighting out there where he was?
A. Well, that's been too long for me to remember. But I could see him so it must have been a light night because I saw him.
Q. I know you saw him, but it was somewhere around 2:00 or 3:00 o'clock in the morning?
A. Yes, I believe it was.
Q. And the lady immediately across the street from you didn't have her porch light on, did she, Mrs. Putnam I think you said.
A. Mrs. Buttner?
Q. Yes.
A. No, she doesn't leave it on at night.
Q. And your light wasn't on?
A. No, it wasn't.
Q. And there is a street light in that area but that is down on the corner, isn't it?
A. Yes.
Q. So that even if the Atchley light were on that would be blocked off from you because of that grapevine arrangement you have over the porch area there, isn't that right?
A. I think the light itself would be blocked but perhaps the radiance wouldn't be blocked.
Q. Some of the radiance?
A. That's right.
Q. If I were to tell you that that was a 60 watt bulb it wouldn't have a tremendous amount of radiance, would it?
A. No, I don't think so.
Q. So you could not be too sure of your colors at that time of the night?
A. I couldn't say anything about color, no.

[fol. 1324] Q. Otherwise you could say a light shirt and darker pants and didn't appear to be dress pants and that is about what you could say?

A. Yes. I felt he was dressed in medium colored clothes.

Q. As I understand it you are not certain whether this occurrence was before or after the fire whistle?

A. I am not sure.

Q. You woke up on both occasions but you are not sure which came which?

A. That's right.

Q. I take it you have made an assumption after having read the papers and so forth that what you saw occurred after Mrs. Atchley was killed, so to speak, is that right?

A. That I assumed that?

Q. Yes.

A. Well, I know if the sound I heard was shots it would have had to have been afterwards.

Q. If the sounds you heard were shots?

A. That's right.

Q. But you don't know whether they were or not?

A. No.

Q. And consequently you are not certain exactly when during the evening this might have occurred? I think the fire was at 2:00 o'clock. It might have been later, is that right?

A. Well, I went to bed about 1:15 and it was after that.

Q. If I were to tell you the fire was around 2:00 and that Mrs. Atchley was killed somewhere around 2:25 to 2:30 you would not be certain whether this occurred at 2:00 or 2:25 or 2:30, is that right?

A. That what occurred? When I saw him?

Q. Yes, the seeing of this man.

A. Well, no, not right now, no. I didn't get up when the [fol. 1325] fire whistle went off though.

Q. But you are not sure whether—you are not sure whether the fire whistle went off after you got back in bed after seeing this man or whether you saw—or the reverse situation, is that my understanding?

A. That's right.

Q. You looked at this gentleman over here, didn't you, when Mr. King asked you to?

A. Yes, I did.

Q. And you said you felt the man you saw was a bit more stocky, as I understood you?

A. Yes.

Mr. Mulkey: What does your client weigh now, Mr. King? You used him for identification purposes in the courtroom.

Mr. King: I don't know whether he has been on the scales recently or not. He weighs 130 pounds he says.

Mr. Mulkey:

Q. If I were to tell you that on this evening in question this man had another additional pounds on his body would that perhaps put him within the class of a person you might have seen that night, a man his size weighing 150 pounds?

A. Well, I don't know. I know that I thought he was a medium height, stocky built person. And I couldn't tell you.

Q. If he had on 20 more pounds on him he would be a bit stocky.

A. Yes. But he is rather short though.

Mr. Mulkey: Would you stand up.

(Defendant Atchley standing.)

The Witness: He is rather short.

Mr. Mulkey:

Q. Let me ask you this in all fairness: If you put 20 [fol. 1326] pounds on him could you definitely say this was not the man you saw that night?

A. I couldn't, no.

Q. And when you opened this door and you say it was apparent to you that the man heard the click of the screen or something——

A. When I unlatched the screen he heard it. When the screen is hooked it puts a tension on the door.

Q. And he looked over your way?

A. He looked my way, yes.

Q. But he didn't break into a run then or anything of that kind?

A. No.

Q. He just kept going as he had been, is that right?

A. That's right.

Q. Assuming this to be the front door of your house—and I am out in the position in the street where you put him—he was looking like this, is that right (demonstrating)?

A. He was looking back, yes.

Q. Was he ever going clear around to get a view of that king (demonstrating)?

A. What do you mean by clear around?

Q. Actually stopping and turning around and taking a gander?

A. No.

Q. Or was he just continuing his pace and looking something like this (demonstrating)?

A. That's right. He didn't break his pace. He kept going and just looking back.

Q. And he continued this looking back for the time when he was 25 feet south of the southerly boundary of your house?

A. I don't know about that. I wasn't interested in whether he was looking back or not, but just that he kept going.

[fol. 1327] Q. Well, how many times did he look back while you were interested whether he was looking back or not?

A. I don't know.

Q. Was it once or more than once?

A. It was more than once, yes.

Q. Twice?

A. Twice or three times.

Q. But not over that as far as you know?

A. That's right.

Q. And you can't tell us whether he was looking at the Atchley residence or not?

A. No, I don't know that.

Q. Certainly. And you say you told Mr. Charles King about this?

A. Yes.

Q. Do you know for a fact that he reported this to Deputy Main?

A. I didn't check on it but I am sure he did if he said he did.

Q. You are sure it is Leroy Main in Gridley that he was supposed to have reported this to?

A. That's what I have thought, yes.

Q. I mean, are you certain?

A. I didn't check with Mr. Main.

Q. If I were to advise you that we did and he has not been apprised of this would that change your opinion on whether it was reported?

A. No, it wouldn't. I know it was reported. Mr. King told me it was reported.

Q. What Tamagni did you talk *you*? Do you know his first name?

A. No, I don't know his first name, but he is an officer in [fol. 1328] Gridley.

Q. With the Gridley police or the sheriff's office? Or do you know?

A. I don't know. I see him in Gridley quite a lot so I imagine it is the Gridley police.

Q. When did you talk to Officer Tamagni?

A. I believe it is about two weeks ago on a Sunday.

Q. Where?

A. He came to my house. He checked all the houses in the neighborhood for two or three blocks around one day on a Sunday.

Q. Did you tell him just exactly what you told us here in Court?

A. Yes, I did. He wrote it down.

Q. And then you did talk with Deputy Brush last week, did you not?

A. Yes.

Q. You told Mr. Charles King about this the next day, is that right, after this occurred?

A. On a Monday, the next Monday.

Q. It occurred then early Sunday morning and you told him about it the following Monday?

A. When I went to work Monday morning we were discussing it.

Q. Who did you next tell about it?

A. I don't know.

Q. Did you tell Mr. Bert King about it thereafter?

A. No. I don't remember. Everyone I talked to concerning it, of course, I told them. But I don't know who I talked to now.

Q. You would know if you talked to Mr. Bert King. He is your employer's other brother.

A. Well, I am sure I didn't. I didn't talk to Bert King, no.

[fol. 1329] Q. How soon did you talk to Mr. Joe King about it?

A. Oh, quite awhile afterwards.

Q. Within a two week period after it happened?

A. It is longer than that.

Q. Did he come and call on you?

A. Yes, he did.

Q. At your home?

A. Yes.

Q. Did Mr. Joe King tell you to report it to the officers too like Charles did?

A. No.

Q. Did he say anything to you with regard to talking to officers or district attorneys about it?

A. No. He asked me who I talked to and I told him and he made no comment.

Q. And in these photographs that have been introduced, so that I get that understood, this bush as we viewed them here in Court to the left of the photograph, that runs over your porch, I take it?

A. Yes.

Q. It was solid on the evening this occurrence happened?

A. Yes.

Q. So that you could have viewed nothing through that?

A. It was not only solid but it bushed out a little into the doorway.

Q. It actually covered also a little beyond that post?

A. Yes, it did. I cut it back since.

Q. And it has been cut back a little bit since?

A. Well, with the leaves off of it——

Q. And then it would actually come out——. As I stand here facing the screen upon which these pictures were projected that bush would actually come out to my right a [fol. 1330] little beyond the white post at the edge of the porch, is that right, on the night this occurrence happened?

A. To your right?

Q. Yes, as I face the photograph, or to one's left if they looked at it from behind the screen.

A. Oh, yes, yes.

Q. Is that right?

A. Yes.

Q. Otherwise behind that white post at the corner of the porch?

A. Yes. The house wasn't visible from where I was standing.

Q. Not at all?

A. Not at all.

Q. What about the car in the Atchley driveway, if there was any? Could you see any car?

A. I don't recall.

Q. You don't recall seeing any car in the driveway? So then you just had a picture of a portion of the road between there until we got over to the right where this other bush, and then the walnut tree occurred, but you had a little vision between the bush and the walnut tree, is that right?

A. Yes.

Mr. Mulkey: Thank you.

The Court: Any re-direct examination?

Mr. King: I think not. I think she has completed her examination satisfactorily for the defendant. Thank you very much.

The Court: Mr. King, don't you think that while Mr. McHugh is here with his equipment set up we had better go through the other pictures and have them introduced in evidence and give counsel an opportunity to cross examine?

[fol. 1331] Mr. King: Yes. Have you been sworn, Mr. McHugh?

The Clerk: Yes, during the opening statement.

Mr. King: I wanted to get that straight. I was confused about it in the opening statement. I didn't realize——. I don't know now whether or not he is.

The Court: I think perhaps we had better swear him again since that was not part of the testimony.

JACK D. MCHUGH, called as a witness by the defendant, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: Mr. McHugh, you have all of the slides in your possession.

The Witness: I will get them.

The Court: Will it take a few minutes to set them up?

The Witness: About one minute to re-arrange them.

Mr. Mulkey: If the Court please, if defense counsel wishes we will ——. I believe there are 16 initially and then there were how many on this occasion?

Mr. King: Three more.

The Court: There are "A-1 through 16", and "B-1 to B-3" inclusive.

Mr. King: There were twenty originally, Your Honor, and one was foggy and we couldn't see it too well, so we put that aside. But there are nineteen total in the box. I don't [fol. 1332] care to have all of them introduced right now if the Court please. I would like to introduce part of them and then go along and identify the ones because some of them are the same general view and I don't want to be bound to comment on each one of them as I go through. Other than those that I wish to ask the defendant about on his direct examination.

The Court: Well, Mr. King, is it your thought that Mr. McHugh would come back and set this up from time to time as you need a picture?

Mr. King: That was my idea and understanding with Mr. McHugh.

The Court: I don't think that is consistent with the handling of this matter efficiently and I am going to ask you to introduce all of your slides at this time.

Mr. King: I can do that, your Honor.

STIPULATION RE ADMITTANCE OF SLIDES IN EVIDENCE

Mr. Mulkey: We are about to offer the stipulation that all nineteen that we have seen may be received in evidence with an opportunity to perhaps ask this gentleman a few questions.

The Court: Do you wish to accept the stipulation?

Mr. King: Yes. I will put them all in, Your Honor.

The Court: Let's understand the stipulation. It was stipulated that the People would agree that the slides here-

tofore introduce and marked for purposes of identification, being "A-1 through 16" and "B-1 through B-3", be admitted in evidence, and the People just reserve the right to cross [fol. 1333] examine Mr. McHugh.

Mr. Mulkey: That's right.

Mr. King: Very well. Now shall I at this time, Your Honor, establish these pictures through Mr. McHugh.

The Court: They have been stipulated to, that these establish the foundation.

Mr. King: I understand.

Mr. Grinnell: There is only one further thing I would ask and that is that the paper which Mr. McHugh has in his hand is the key to the different positions that these pictures were taken from and we would respectfully ask the Court that that come in as a portion of the exhibit on the pictures so that when we are cross examining on it we can immediately refer to the key and tell where that particular picture was taken without going back to Mr. King's opening statement where he said the picture was taken from.

The Court: I think that is proper. Don't you, Mr. King?

Mr. King: Yes, sir. That is agreeable with me.

The Court: All right.

Mr. King: Does counsel wish to cross examine Mr. McHugh.

The Court: It is understood the pictures are admitted in evidence and the People may cross examine then on the pictures heretofore admitted.

Mr. King: Just on the pictures, Your Honor. Not on [fol. 1334] the qualifications of Mr. McHugh.

Mr. Mulkey: I am not going to ask him anything on his qualifications. He took the pictures.

DEFENDANT'S EXHIBITS "A-1 through 16"

Photographic slides received in evidence.

DEFENDANT'S EXHIBITS "B-1 through B-3"

Photographic slides received in evidence.

Cross-examination

By Mr. Mulkey:

Q. I am referring now, Mr. McHugh, to the photographs taken that have heretofore been shown to the jury from the

Scharsch window which, as Mr. King indicated, were taken at varying angles and at varying heights of the view into and about the Atchley property. Perhaps you can edify me. What are those three numbers so we can have them for the record?

A. Taken from inside the house?

Q. Yes.

A. They are "6" through "10".

Q. "6" through "10"? Those would then be "A-6 through 10"?

The Court: That is correct.

Mr. Mulkey:

Q. As to those photographs, these are just particular angles that, under Mr. King's direction, you took particular [fol. 1335] views. Is that not correct?

A. Yes.

Q. And the pictures could have been taken from a number of varying angles, either right to left or up or down, other than what we have here?

A. That is right.

Q. These purport to give certain angle views but they do not purport to give the total panorama as one would view a scene of that kind from outside that particular window?

A. That is right.

Mr. Mulkey: That is all I want.

Mr. King: May I ask just one question, Your Honor.

Redirect examination

By Mr. King:

Q. You did, however, hold the camera level at all times?

A. Oh, yes.

Q. There was no up and down business?

A. There is no up and down.

Q. And you did measure off and indicate the center of the window, above the window ledge and below the window itself, the board of the window, the wood part of the window?

A. Yes.

Q. And so three of those pictures are taken through the screen and three of them are taken clear up above? You put the shade up and you took three up above the middle of the—up above the middle line of the window, didn't you?

A. I took approximately—I took three approximately five inches up from the sill and one about 10 inches.

[fol. 1336] The Court: Mr. King, so this testimony will have some meaning, I think the witness should refer to his notes and let us know which exhibits are which.

Mr. King: Yes, Your Honor.

Would you do that please, Mr. McHugh?

Mr. Grinnell: I was having it marked in evidence, Mr. King. I am sure you overlooked that.

Mr. King: Thank you.

The Witness: No. "6" was taken five inches up at the right corner of the window.

Mr. King:

Q. Not too fast until I get this straight now. This is important. Five inches up?

A. Yes.

Q. From the sill?

A. From the sill on the right corner of the window.

Q. On the right corner of the window?

A. Yes, right alongside the jamb.

Q. In other words, if the window had been raised between the board that goes along the lower part it would have been right in the middle, wouldn't it? I mean, if there was a 10 inch opening there it would have been right in the middle?

A. That's right.

Q. And right over on the right edge?

A. That is right.

Q. Now, the next one?

The Court: Mr. McHugh, one other question. Is that apparent from your list there, your notes?

The Witness: I have it stated here "inside house, [fol. 1337] right corner". And I have a little drawing of a window showing where the pictures were taken with the letter on it. That is, I first made my description.

Mr. Grinnell: Would that indicate it is up five inches from the window sill?

The Witness: No, it doesn't.

The Court: So he should proceed to give us those.

Mr. Grinnell: Could you mark that on those, the ones that were taken five inches up from the window sill.

The Court: How has the Clerk marked the list of the slides?

The Clerk: I have not marked them.

The Court: We have used "A" and "B" for the slides. I think probably it should be Defendant's Exhibit "C".

DEFENDANT'S EXHIBIT "C"

A document identifying photographic slides,

Received in evidence.

Mr. Mulkey: Do you have any more questions?

Mr. King: Yes.

Q. Now, then, the next one taken over——

A. No. "7" was taken from the middle of the window five inches up.

Q. From the sill?

A. From the sill.

Q. And again I ask you if the window were raised 10 inches that would be right in the middle of the window and [fol. 1338] an equal distance from the window and the sill?

A. That is right. No. "8" was taken five inches up from the sill at the left hand corner of the window.

Q. These three were all taken through the screen with the window raised?

A. They were.

Q. Now take a series of three more. Which side did you start on there?

A. Well, No. "9" was taken 10 inches up in the middle of the window.

Q. And you measure from the window itself, did you not?

A. From the sill.

Q. From the sill? All right.

A. No. "10" was taken five inches up at the middle of the window and it was a straight shot looking directly at the Atchley house.

Q. It was 10 inches from the sill too?

A. No. That was five inches.

Q. Five inches from the sill?

A. Yes.

Q. Through the screen?

A. Through the screen.

Q. Now, you haven't gotten to the window. You took some through the window and screen.

A. No, I did not.

Q. You did not? You took them just across there? How many did you take?

A. Five from inside the house.

Q. And weren't some of those taken up above where you went through the glass and window too?

A. No, they were not.

Q. All right. Now, you had some pictures taken outside, too, didn't you?

A. Yes. No. "11" was taken outside the house on the right hand corner of the window and approximately the [fol. 1339] same position as No. "6". They were taken from outside of the house.

Q. All right.

A. No. "12" was taken at the middle of the window where No. "7" was taken. No. "13" was taken at the same position as No. "8", at the left hand corner of the window.

Q. Now, they were taken at the same angle, were they?

A. They were taken approximately the same angle looking towards the front yard.

Q. There were some other pictures taken in that series. Would you go ahead and explain what they were?

A. No. "1" was taken 102 feet from the property line from a field looking at the Atchley house and the house and the yard and the house next door.

Q. Is that directly across the street?

A. Yes, it was.

Q. From the Atchley house?

A. From the Atchley house.

Q. Now, that was No. "1"?

A. That was No. "1".

Q. No. "2" was what?

A. No. "2"——. Did you wish to show these at the same time?

Q. I might.

A. I mean so the jury can see what they look like again.

Mr. King: Does Your Honor——

The Court: I don't see——

Mr. Grinnell: They have already been shown. We are willing to stipulate Mr. McHugh took them.

Mr. King: All right. Go ahead.

A. No. "2" was taken from the property line of the [fol. 1340] Atchley house looking into the yard. No. "3" was looking into the back yard of the Atchley house. No. "4" was a general scene from across the street looking at the Atchley house yard and part of the house next door. No. "5" was looking down Nevada Street for a general scene of the street showing where the Atchley house and the houses were located.

Q. That was the picture we put on here first this afternoon?

A. Yes, sir. No. "14" was taken from the corner showing a general scene of Nevada Street. No. "15" from the same position but looking more towards the east. No. "16" was looking almost directly east.

Q. Can I make that out from that paper?

A. I don't have the direction here.

Q. In your absence it will be difficult to know which picture is which unless you do put the direction on the copy there, Mr. McHugh. Would you be kind enough to do that please?

The Court: We have the reporter's transcript, Mr. King.

Mr. Grinnell: I think we both are familiar enough with the area, Your Honor, that we could tell from a look at the picture.

The Witness: Slide "B-1" was taken from across the street, the doorway, at a height of the lady's house. I measured about how high she was, held a camera at her eye level and took picture "B-1, B-2 and B-3".

[fol. 1341] Q. Were those three pictures taken right at the sill of the house?

A. They were taken at the door jamb with the screen door open.

Mr. King: Thank you very much.

Mr. Mulkey: I have just one thing, one or two things.

Recross-examination.

By Mr. Mulkey:

Q. Going back to this question of angles through that window actually when you take a still photograph, say in the center of the window or wherever it might be, you don't get within that photograph the same total view as if I stood right there and looked at it with both of my eyes?

A. No.

Q. You get something less than that?

A. You get something less.

Q. You don't have this periphera thing people are supposed to have. And these photographs were all taken on November 1st?

A. November 1st from 2:15 to 3:00 p.m.

Q. Of course, as you and anyone would know, foliage and so forth has changed considerably since August?

A. Yes.

Mr. King: And that goes too for that grapevine you saw right out by Mr. Scharsch's window.

The Witness: I imagine it would.

Mr. Mulkey: That is all.

Mr. Grinnell: Would you hand that list to the Clerk, please so we can mark it in evidence.

[fol. 1342] The Court: The list is going to be marked as——

The Clerk: Defendant's "C"

The Court: Defendant's "C".

Mr. Grinnell: It won't inconvenience you if you leave your equipment over here for several days, will it?

The Witness: No.

[fol. 1343] Mr. Chesley Rushton, a witness produced on behalf of the Defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. King:

Q. Your name please?

A. Chesley Rushton.

Q. And your occupation?

A. Deputy Sheriff.

Q. And you are now employed by the County of Butte in the Sheriff's Department?

A. I am, yes, sir.

Q. Now I talked with you last evening?

A. Yes, sir, you did.

Q. And inquired whether or not you were present when Jack Atchley and his step-daughter came to the local Sheriff's Office?

A. You did.

Q. Do you recall approximately or about the time that Jack Atchley came to see you in company with his foster daughter Barbara?

A. I don't remember the time exactly, it was several months prior to this occurrence.

Q. Yes, and what did they come to report?

A. It was in regard to his step daughter having trouble with her mother and he was asking advice on it and what he should do.

Q. And what was the nature of the trouble?

A. I don't recall the exact conversation.

Q. We can't hear you, Officer, you will have to speak out louder. I will step back here so that I can hear you from here and then I am sure the jury can hear you.

A. I don't recall the exact conversation, but the point of it [fol. 1344] was that the girl was a little unhappy at home in respects to conditions and in respect to her mother and that she didn't want to stay there and was having thoughts of running away and that was the main points of conversation.

Q. Now did they mention at that time any people by the name of Snow?

A. I don't recall.

Q. Or White?

A. I don't recall.

Q. That doesn't refresh your memory concerning any further part of that conversation?

A. No.

Q. Now did he exhibit any document to you that evening?

A. Yes, he did, the marriage certificate.

Q. And what was said about the marriage certificate.

A. I don't recall the exact words but he offered this marriage certificate to me to show that they were married and that he was the girl's step father and the exact conversation I don't recall.

Q. It showed that he was married to whom?

A. To, I can't remember her name.

Q. Marcella Katherine Ferris?

A. Ferris.

Q. Was the name she went by before she changed it to Atchley?

A. Yes.

Q. And that was the name, was it?

A. Yes, sir.

Q. And do you recall on or about what day the license bore?

A. No, I don't, I merely glanced at it and it was a marriage certificate and I determined that the name was on there and that was all, I didn't glance at the date or anything else.

[fol. 1345] Q. And was anything said about welfare at that time?

A. No, sir.

Mr. King: You may cross examine.

Cross-examination.

By Mr. Grinnell:

Q. How long have you been a deputy sheriff, Mr. Rushton?

A. Little over four years.

Q. And prior to that time who were you employed by?

A. I was employed by A. Ley & J. Zentner Co.

Q. During the time you have been in the Sheriff's Office you have talked to many parents of minor children regarding conditions at home, have you not?

A. Yes, sir.

Q. And in particular the condition about children about the age of 14 to 15 having the opinion of wanting to run away from home?

A. Yes, we have that come up.

Q. Quite frequently as a matter of fact?

A. Yes.

Q. Was there any difference about Barbara wanting to run away from home, if that be the case, than any other one that you run into?

A. It was along the same lines.

Q. Nothing unusual about it that you can recall at this time?

A. No, sir.

Q. What is your recollection at this time as to the reason Mr. Atchley pulled out the marriage license to show it to you?

A. As nearly as I can recall this was during the conversation to show that he was actually married to the mother and that he did have some control over the child through the marriage and was trying to help the child as much as [fol. 1346] he could.

Q. I see, your recollection is that this was in the nature of a domestic problem concerning the child, is that correct?

A. Yes, sir.

Q. It had nothing to do, as you recall with welfare?

A. No, sir.

Q. It had nothing to do with any threats made by the mother to the daughter or to Mr. Atchley?

A. No, sir, not that I recall at all.

Q. And as a matter of fact do you know whether the girl did run away from home?

A. Not to my knowledge.

Q. You don't know that she did?

A. No.

Q. You never heard any more of the case, did you?

A. No, sir.

Q. And about how long have you known Jack Atchley?

A. I have known Jack I believe I first met Jack possibly between two and three years ago.

Q. And have you—did you become acquainted with his deceased wife?

A. Yes, I talked to her, on I believe at least one occasion and possibly more.

Q. And did either one of those occasions, did you observe anything out of the ordinary, out of the usual when you saw them on these two occasions?

A. No.

Q. And you weren't out there in response to any police call or anything like that?

A. No, this was in regard to other matters concerning other people.

[fol. 1347] Q. And there relationship at least o. the times you saw them appeared to be normal, is that correct?

A. Yes.

Q. And you don't recall at this time, do you, whether or not the mother called and talked to you about this problem concerning her daughter or not?

A. No, sir.

Q. It was just Mr. Atchley?

A. That is correct, yes.

Q. And and after they left your office you don't know where they went?

A. No, sir.

Q. As far as you know they did go home though?

A. Well, I don't know, they could have gone any place.

Q. Well, your records do not indicate that the girl ever run away from home, do they?

A. No.

Q. She was never listed as a run-a-way juvenile?

A. No, sir, not to me.

Q. And you have already indicated that this is not an uncommon problem?

A. That is correct.

Q. As a matter of fact it is probably true that at one time in your life you probably considered the same thing yourself?

A. No, not myself, I never did.

Mr. Grinnell: That is all.

Redirect examination.

By Mr. King:

Q. Now, Officer, I am going back to the conversation a minute, Mr. Atchley had there when Barbara was present, do you recall anything about him saying that they were on their way out to the hospital to see Kay?

[fo 1348] A. No, I don't recall. As I stated I didn't make any notes of this and in fact I had forgotten the whole situation, it had slipped my mind until one evening Jack

asked me if I had recalled it and then I did recall they had been in there and we talked. I made no report on it as I didn't consider that it was necessary to make a report on it and we talked for possibly 15 minutes or so in the investigator's office in the sheriff's office and it had happened sometime before and like I say I didn't take notes and I didn't have anything to refer to and this is entirely from memory. It could have been possible that he did make that remark.

Q. Yes, and he was primarily, from your memory of the conversation, he was concerned with the welfare of the little girl?

A. Yes.

Q. And he might have said something about their domestic affairs, about welfare, and so on.

Mr. Mulkey: Just a moment, this is defense counsel's witness.

Mr. King: I understand that, but I am trying to refresh the memory of the witness.

Mr. Mulkey: He is leading the witness all over the Courtroom and I object to it on that ground.

The Court: It is leading, you can ask him about the conversation.

Mr. King: Yes. (Questioning witness) Recall if you can anything addition in the 15 minute conversation, that [fol. 1349] you talked about, officer?

A. I can't recall anything in addition to that with the exception that on the welfare point, I cannot recall that being brought up at all but there is a slight possibility that might have been mentioned, but I don't recall it.

Mr. Mulkey: Nothing further.

Mr. King: Mr. Bailiff, call Mr. Bean.

(Bailiff returns without locating witness:)

Mr. King: The witness has been subpoenaed, Your Honor, and notified he would be called this afternoon. I heard he was ill and evidently he has gotten worse. At this, if the Court please, my next witness after Mr. Bean would be the defendant himself and I have noticed—and his testimony will take of course considerable time and rather than break into that testimony I respectfully request, Your

Honor, to recess at this time, since I see it is approaching the hour of 4:30, and permit me to start with my client in the morning.

The Court: When will you put Mr. Bean on, some other time?

Mr. King: Yes, I will put him on at the conclusion of the defendant's testimony.

The Court: Under the circumstances, Ladies and Gentlemen, we will take our adjournment for the day and can you resume at 9:30 tomorrow morning, Mr. King?

Mr. King: It would rush me, Your Honor, but I could do so.

[fol. 1350] The Court: There seems to be so many interruptions.

Mr. King: It would please me if we could start at 10, I have been going night and day on this matter, whether it appears that way or not and I have a good many things to do since I am handling this single handed and without the assistance of an investigator or any one of that sort and it does rush me considerably to get here at 10:00 o'clock even in the morning, I have so much to do, even though I get up at 6 in the morning, and 9:30 is a little bit early.

The Court: Can you tell me how long you expect to take on the balance of your testimony?

Mr. King: The balance of my testimony will take more than tomorrow and perhaps the following morning, I am assuming the District Attorney will cross examine the defendant at some length.

The Court: There are other witnesses, is that right, in addition to Mr. Bean and the defendant?

Mr. Grinnell: I assume, he already said he is going to call his brother and then we know Doctor Caffaratti is going to be called.

The Court: I think we will start at 9:30 in the morning, Mr. King, and we can get on with it, so Ladies and Gentlemen, please remember the instructions of the Court not to discuss the case or to form an opinion or conclusion until the case is submitted to you. We will adjourn at this time until 9:30 tomorrow morning.

[fol. 1351] Tuesday, November 25th, 1958 Morning Session, Tenth Day

Court was called to order at 9:30 o'clock a.m.

The Court: We are ready at this time to proceed with the trial of People vs. Atchley. Let the record show that the jurors are present and seated. Is the defendant ready to call his next witness?

Mr. King: Yes, Your Honor. Your Honor, during the interim last night some evidence came to my attention which is very important to the defense of this case and I would like at this time to call Mrs. Edsinger back. There has been one brief witness between her testimony yesterday and now calling Mrs. Edsinger, and I am calling her for the purpose of going into the identification of the man that night, it is very material to the defendant and I can, if the Court please——

The Court: (Int.) You may do so.

Mr. King: Thank you. Would you call Mrs. Edsinger.

Mrs. Gertrude Edsinger, a witness previously duly sworn on behalf of the defendant, resumes the stand for further interrogation:

[fol. 1352] Direct examination.

By Mr. King:

Q. Come in Mrs. Edsinger, please, and be seated in the witness chair. You have already been sworn. You are aware, are you not, Mrs. Edsinger, that I called you back here today to testify further as to the identification of the individual that you saw going south on Nevada Street that night.

A. Yes.

Q. Thank you very much for coming. Did you, when you noticed the individual going south that night, notice any peculiarity in his walk, the way he walked, outside of the fact that he was going very rapidly?

A. No, I didn't.

Q. Did the individual that you saw going south very rapidly, limp?

A. No, he didn't.

Q. Did he have any peculiar gate or anything of that sort?

A. I didn't notice any, no.

Q. Did you have a sufficient view of the individual, if he had of limped, would you have known it?

Mr. Mulkey: Just a minute, I am going to interpose an objection, Mr. King. I would like to object to the question on the ground it is leading, that he has been leading this witness ever since she resumed the witness stand this morning. We are not really hearing testimony from Mrs. Edsinger.

The Court: Well, the objection goes to this particular question and the objection will be sustained.

Mr. King: Very well, if the Court please, could I ask [fol. 1353] the defendant to remove his coat and stand here in the doorway and walk rapidly around the railing here and outward to the door, the exit of the Courtroom so that this witness could see how he walks rapidly.

Mr. Grinnell: Your Honor, if we are going to have a demonstration, the People have no objection, however, I would think that if we are going to have a demonstration it should be as nearly as possible under the conditions as they were at that time and I don't think that any walking in the Courtroom is going to in any way indicate to this jury what Mrs. Edsinger may or may not have seen at 2:30 in the morning on August 3rd under the lighting conditions that existed. The man is dressed entirely different. The terrain is different. The lighting conditions, everything is different and she already said she could tell whether he was limping or not, that he didn't appear to be. Now apparently after thinking it over over night Mr. King is going to obviously have his client limp through the Courtroom and ask Mrs. Edsinger is that is the person she saw and of course I think that that is improper, Your Honor, for the reasons that I have stated.

Mr. King: If the Court please, that is not my intention at all. Your Honor heard in my opening address, and we will show here by competent evidence that the defendant's foot has been cut off in the region just below the ankle and that when he walks rapidly, and it only came to my

attention last night through the lips of a witness, I wasn't aware that the defendant walked, when he walked rapidly [fol. 1354] or runs, and it is very obvious that he just simply cannot walk rapidly or run without having a very distinguished appearance. The inability that he suffers makes for a very definite limp and as I say it would be very beneficial to the defendant to permit this witness to see him walk through the Courtroom at a very rapid gate to ascertain whether or not it was the same individual that went south on Nevada Street that night. I cannot stress the importance if the Court please, of such a demonstration to the defendant's case.

Mr. Grinnell: May I offer the objection——

Mr. King: (Int.) May I just finish.

Mr. Grinnell: (Int.) Please, let me interpose an objection. An objection is being made, Your Honor, we have just witnesses apparently what purports to be an offer of proof in front of the jury which is highly irregular and prejudicial misconduct as far as the District Attorney's Office is concerned on behalf of Mr. King, he has made a statement here in the presence of the jury and there is no evidence at this time as to whether it can be connected up or not and I feel that this prejudicial—if he has any evidence at this time and wishes to make an offer of proof, he with his many years of experience, certainly knows that should be made in chambers and not in front of the jury.

The Court: Well, that is correct, Mr. Grinnell, although counsel approached the matter by way of argument in [fol. 1355] support of his request for a demonstration.

Mr. Grinnell: And when we interpose our objection about the conditions under which this was to be inacted, then he launched into this.

The Court: I understand and this is the ruling of the Court. The court will permit the defendant to do what his attorney requests, but I wish to call the attention of the jurors to the fact that the conditions obviously are not the same as the conditions were on the night of the killing. The ground is not the same, the terrain is not the same, the lighting is not the same, the conditions of visibility are not the same. More than that the interest of the defendant here is obvious. Now with that in mind you may go ahead with your demonstration.

Mr. King: Thank you. Would you remove your coat, please, Mr. Atchley and step over to the door and walk over as rapidly as you can over to where the bailiff is standing and walk at your normal gate please—I mean a very fast gate.

Mr. Mulkey: That wasn't her testimony.

(At this time defendant does as requested:)

The Court: Is that all, Mr. King?

Mr. King: Yes, Your Honor. (Questioning witness) Did you observe the defendant walk?

A. Yes, I did.

Q. From the one door to the other?

A. Yes, I did.

Q. Did you see the individual sufficiently the night that you have testified about, did you see him sufficiently to [fol. 1356] know whether or not that gate——

Mr. Mulkey: (Int.) I am going to object to that question as leading. I objected to that very same question, Mr. King, and the Court made a ruling on it.

Mr. King: Well, I wasn't aware of the ruling, Your Honor, that the Court had passed on that particular question. There has been some other evidence in the record since the time Your Honor ruled on the previous question.

Mr. Mulkey: If the Court please this witness has been in this Courtroom and has testified to what she observed that night. Now Mr. King wants to fit her words with the opportunity to observe by purely leading questions and I object to them on that ground and I think the Court has made one ruling.

The Court: The objection will be overruled.

Mr. King:

Q. Will you answer please?

A. Yes, the person I saw walking did not limp and I believe he was a heavier person than Mr. Atchley.

Q. You say heavier?

A. Heavier, stockier man.

Q. And after having seen the defendant walk through the Courtroom, would you say that the defendant was not

walking south at that time that you have testified about on Nevada Street?

A. The person that I saw, I don't believe was the defendant.

Q. That is going to be your statement, definitely, is it?

A. Yes.

Q. It was not Atchley?

Mr. Mulkey: Just a moment, Your Honor, she said, [fol. 1357] "the person I saw I don't believe was the defendant" so Mr. King immediately gives her the answer, "That is going to be your statement, that was not Atchley." That was a leading question if I ever heard one.

The Court: It is and the objection is sustained and the testimony of the witness will be stricken and Ladies and Gentlemen, you are requested to disregard it.

Mr. King: All right, Your Honor, (Questioning witness) Let's go a little further, if we can and get a better picture of the individual that went south that night, would you care to add anything to what you have previously testified to?

A. Well, I can't think of anything to add to it except when I got home last night I was thinking of the size of my oldest son, who is five feet nine and weighs 160 pounds and he is a person of not very large built, Mr. Atchley much smaller than my son of course and the person that I saw walking down the street was a much heavier person than my son would have been and I was comparing the two and I believe he was a heavier person than that.

Q. To sum up then, your son——

The Court: (Int.) Mr. King, that would be leading and you are not to sum up the testimony of this witness.

Mr. King: Very well, Mrs. Edsinger.

The Court: This matter of the weight of the person who went down the street and how they appeared was gone into yesterday and it is not necessary to bring out any [fol. 1358] further questions on that subject at this time.

Mr. King: Very well, Your Honor. (Questioning witness) Mrs. Edsinger, the trimming that you did on the vine that is on your front porch, you testified yesterday in cross examination that along the post that we saw to the left in the picture, that you had done some trimming.

A. Yes.

Q. Just how much trimming?

A. The foilage when it was in—had the leaves on it—it came out at least this much beyond the post on the left (indicating).

Q. You are indicating about 6 inches there?

A. Yes, when it lost its foilage there was nothing there but the bare vine and I cut them back so they would be protruding in the doorway.

Q. That was the only change that was made?

A. Yes.

Q. That six inches of foilage from what we saw here in the picture of that particular scene where we had the post right on the left of the picture, that is right, is it?

A. Yes.

Mr. King: Do we have the trousers that were introduced in evidence?

The Clerk: Yes.

Mr. King:

Q. May I ask you, while the clerk has gone for the trousers, are you acquainted with the son of Mr. and Mrs. Scharsch who lives across the street from you, one house removed.

A. I have seen him at a distance.

Q. Over where?

A. In his yard.

Q. And comparing the man that you saw that night in [fol. 1359] relation to Mr. Scharsch's son, what would you say about that?

A. Well, the person that I saw wasn't a child.

Q. No.

A. Mr. Scharsch's son looks like a child.

Q. What size is he as far as you could describe him?

A. In pounds?

Q. No, just generally giving the description you have made here of the man that was walking down the street that night.

A. Well, I would say he is from 12 to 14 years old.

Q. Yes, how about his size.

A. He is kind of chubby.

Q. And how was the individual that you saw going down the street that night, taller than the boy that I am talking about?

A. Yes, I think he was.

Q. And was he huskier?

A. Yes, but not fat.

Q. Now I am going to show you this pair of trousers that has been introduced in evidence here marked People's Exhibit 32 and ask you whether or not these were the same color of the trousers that you saw on the man going down the street that night?

A. Well, I can't say as to color but I had the thought he was dressed in medium colored clothes and the trousers darker than the shirt, but medium color.

Q. Not as dark as this I am showing you?

Mr. Mulkey: Just a moment.

The Court: It is leading, the objection will be sustained.

Mr. King: Very well, Your Honor, (Questioning [fol. 1360] witness) With reference to the pair of trousers I now exhibit to you, and the pair of trousers you saw on the individual that night, would you say there was a difference, if you understand what I mean.

A. In color you mean?

Q. I beg your pardon?

A. You mean in color or style?

Q. No, I meant in color, darkness and lightness.

A. Well, I thought the trousers he was wearing was of a medium shade, probably suntans, I don't know though, it was at night.

Q. You saw these trousers here, what shade would you call those?

A. Those are blue.

Q. And what color blue?

A. Dark blue.

Mr. King: That is all.

Cross-examination.

By Mr. Mulkey:

Q. Mrs. Edsinger, you saw the defendant perform his stint here in the Courtroom?

A. Yes.

Mr. King: Just a moment, I object to the Court please, I understood counsel to use the word stunt.

Mr. Mulkey: I said, "Stint".

Mr. King: I didn't understand it that way, excuse me, Mr. Mulkey.

Mr. Mulkey: Yes, Mr. King. (Questioning witness) You say the person you saw that night wasn't limping?

A. No, he wasn't.

Q. Are you certain of that?

A. I am certain, Yes.

Q. You saw him for a matter of what,—did we establish yesterday?

[fol. 1361] A. About a very sho-t time.

Q. Forty to fifty feet and within a few seconds time?

A. That is right.

Q. And you can positively state that there wasn't a trace of a limp?

A. Well, I think that what we are looking at here is more than a trace. He wasn't limping, Mr. Mulkey, he was going fast and with a sure fast step and he wasn't limping.

Q. Well, I asked you, there wasn't a trace of a limp and you are absolutely positive of that?

A. Well, a trace is bringing it to a fine point.

Q. I understand that, Ma'am.

A. Well, I don't believe there was a limp, no.

Q. You are positive there was absolutely no limp of any kind, nature or anything else?

A. I won't be absolutely positive of anything.

Q. No.

A. But I don't think there was a limp.

Q. No, but you won't be positive because you didn't have a very long time to observe this person, did you?

A. No, that is right.

Q. And as you said, you never say the person before or since?

A. Well, I don't know, I didn't try to identify him, I just saw some one walk past and they were going fast and I watched to make sure they kept on going and then I went back to bed.

Q. But as I say——

[fol. 1362] A. (Int.) I didn't care who it was, I wasn't interested.

Q. That is right, as you say you didn't care who it was, you weren't interested. You have a certain impression of the size of this man, but as you indicated to this jury yesterday in the Courtroom this could be the man you saw, Mr. Atchley (Indicating).

A. I do honestly believe that Mr. Atchley is a smaller person, honestly I do.

Q. But this man could be the man, that was what you told this jury yesterday.

A. If you would have added pounds to him.

Q. If I added 20 pounds to him, that was what he weighed the night this occurred, 150 pounds.

Mr. King: Just a moment, I object to that, If the Court please, counsel is very obviously telling to this witness and the jury——

The Court: The objection will be sustained, unless the people can connect it up and show that that is the defendant's weight.

Mr. Mulkey: Well, I have the booking sheet right here and he was weighed that night and I would be happy to introduce it in evidence if Mr. King wants it, the weight he was booked into the jail.

The Court: Mr. Mulkey, you do not have to produce that at this time.

Mr. Mulkey: I would be happy to, Your Honor.

Mr. King: Of course I wouldn't want that to go into [fol. 1363] the record at this time until I could examine the person who made the report, he could have guess- at the weight as far as I know.

Mr. Mulkey:

Q. If this man weighed 150 pounds, 20 pounds heavier than he is now, then this could have been the man, that was what you told the jury yesterday.

A: Are you waiting for me to answer.

Q. Isn't that correct?

A. Yes, that was what I told them yesterday.

Q. Isn't that still correct?

A. Well, when I got home and was thinking about the size of my son who weighs more than 150 I felt like it wasn't correct.

Q. Well, I mean are you therefore prepared today on the witness stand to positively say it wasn't this man (indicating)?

A. How could I do that?

Q. That is what I mean, Ma'am, so it could have been Mr. Atchley as you see him seated here right now today?

A. I can't identify the person that was going by.

Q. All right, but it could have been this man that is seated over here next to Mr. King, the defendant in this case, Mr. Atchley?

A. I can't say that it wasn't.

Q. Then your answer to my question would be, "Yes", would it not?

A. Okay, yes.

Q. I beg your pardon.

A. Yes.

Q. And the man you saw did have a lighter shirt than trousers?

A. Yes.

[fol. 1364] Q. And you had an impression that they were of medium color but you are not certain exactly what color they were?

A. [redacted] not.

Q. And he had no hat?

A. No hat.

Q. No necktie?

A. No necktie and no coat.

Q. And no coat. Look at me here, Ma'am, can you tell me what I weigh?

A. About the same as Mr. Atchley.

Q. What would that be?

A. 130 pounds, 140 pounds.

Mr. Mulkey: Stand up, Mr. Grinnell. (Questioning witness) Can you tell me what Mr. Grinnell weighs?

A. 170.

Mr. Grinnell: 195.

Mr. King: If the Court please, I don't know if any of the jurors heard that or not, but counsel made an aside to his

associate counsel and I am sure it came over to some of the jurors and I would assign it as prejudicial and I would like to argue it out of the hearing and presence of the jury.

The Court: The witness made an estimate of Mr. Grinnell's weight and it can go in as part of the defendant's rather as part of the People's case in rebuttal if you wish as to what his weight was.

Mr. King: I wasn't talking about that, I was talking about the aside counsel made that was very obviously heard by the jury and that is what I am objecting about, of course perhaps all members of the jury didn't hear it.

The Court: I think then, in order to correct any possible [fol. 1365] error that Mr. Grinnell should testify to his weight when the proper time comes.

Mr. Mulkey: I would be perfectly happy to, Your Honor. (Questioning witness) You went home last night and thought about this, is that right?

A. Yes.

Mr. King: Would you speak up please, Mrs. Edsinger, so that I can hear and so that the record can be complete in this case.

The Witness: Yes, I went home last night and thought over the size of the person I had seen in comparison to the size of Mr. Atchley and I was thinking of my own son who weighs 160 pounds and he is a slight built person, and how he is so much larger.

Mr. Mulkey:

Q. What did you do after you thought about it?
A. I didn't do anything.
Q. You didn't call Mr. King up?
A. No, I thought I was through.
Q. You didn't contact Mr. King?
A. No.
Q. What did you do, just come over to the Courthouse this morning and say, "I want to testify"?
A. No, he came over this morning and asked me to come back and testify.
Q. You didn't talk with him these matters that you thought over last night?

A. No, I didn't.

Q. Not until you took the stand here this morning?

A. He came into the room where I was waiting and I told him this, yes, this morning, in the Courtroom.

[fol. 1366] Q. You didn't tell him last night?

A. If it is not improper, there is a person who has come into the Courtroom who is very much the same build as was the person walking down the street, is that out of order, to ask him to come up?

The Court: There is no question before you, Mrs. Edsinger.

Mr. Mulkey:

Q. You didn't tell Mr. King about this last night?

A. I didn't see him when I went home from the Courtroom last night, I went back to work and worked until 5:30.

Q. And you had talked this matter over with nobody, you didn't talk it over with Mr. Charlie King or somebody else?

A. Mr. Charles King was out of the office, he is due to go into the hospital today and he was home at the time.

Mr. King: May I hear the answer.

The Witness: I said Mr. Charles King wasn't there at the office, he is due this morning in the hospital so he was home.

Mr. Mulkey:

Q. What about Mrs. King, is that who you discussed it with?

A. I mentioned to her a few things but we didn't stop to talk about it because we were trying to get some work done.

Q. You did mention these matters that came up today?

A. Not in detail.

Q. You did mention them to her?

A. Nothing about the situation, no.

[fol. 1367] Q. The limp then or something?

A. No.

Q. Well, what?

A. Let me think, I really don't remember, we said very little about it.

Q. And then just sort of out of a clear blue sky Mr. King asked you to come back this morning?

A. That is true, he came there before I was hardly out of bed.

Q. Oh, he came into your place, into your home?

A. He knocked on my door and asked me to come over and I said, "Well, if it is necessary I will" and he said, "It is", so I said, "All right", and I closed the door.

Q. This is after you talked to Mrs. Charles King?

A. Yes, I saw her, we were working for an hour after I got over there last night.

Q. Now did I understand your testimony correctly, that you went to Officer Tamagni or did he come to see you?

A. He came to my house.

Q. This was around the first of November?

A. Around that time, yes.

Q. Just before this trial started?

A. It has been about two weeks or so ago, on a Sunday.

Q. Did you since yesterday ascertain any further whether Deputy Main was actually informed about this matter?

A. I didn't ask Mr. King, he wasn't there and I didn't mention it to any one.

Mr. King: For the Court's information I will have Mr. King here to testify about that. He is in the hospital [fol. 1368] today but he said the operation is not too serious and he thinks he can be here tomorrow morning.

Mr. Mulkey: That is all.

Redirect examination.

By Mr. King:

Q. Mrs. Edsinger, I heard you say something about some one just coming in the Courtroom as being the same size as the individual who went down the street that night, point him out to me.

A. This is only generally speaking, in what I mean by a stocky built person, if he don't mind, he is from Gridley, I hope he will forgive me, but the gentleman with his hand on his chin.

Mr. King: Will you stand up please, sir.

(At this time member of audience stands:)

The Witness: Sort of that built.

Mr. King:

Q. Heavier or lighter than that man?
A. I think heavier but sort of that built.

Mr. King: Would you take your coat off and stand up again please?

(Member of audience takes coat off and stands:)

Mr. King: Now if Jack (Questioning witness) Going back to this man here, would he be taller?

A. Heavier.
Q. Would the individual be heavier?
A. Heavier.

(At this time member of audience and defendant Jack Atchley stand side by side:)

Mr. King:

Q. Now since they have walked out here together, could [fol. 1369] you tell now, describe to this jury the difference between the individual going down the street and the defendant?

A. Now this individual was very much broader and huskier, had more meet on them.

Q. More meet on than both of the——
A. (Int.) Yes.

Q. Wider shoulders, you indicate up here on your shoulders?
A. Yes.

Q. A bigger torso in other words?
A. Yes.

Mr. Mulkey: Just a moment, Mr. King, is your witness going to testify or are you?

Mr. King: I will withdraw the question, I didn't mean to put that question to her, I am sorry. (To member of audience) You may be seated.

The Court: Pardon me, Mr. King, I would like to have the gentleman's name for the record.

Mr. King: What is your name please?
Member of Audience: Clarence Martin.
Mr. King: And you live in Gridley, Mr. Martin?
Mr. Martin: Yes.

Mr. King:

Q. Now would you tell this jury just exactly the size of the individual?

Mr. Mulkey: Could we know how much Clarence weighs?
Mr. King: If you want to ask him, go around and ask him.
Mr. Grinnell: Your witness testified this man looked like him.
[fol. 1370] Mr. King: Just a moment, from this witness' testimony——
Mr. Grinnell: (Int.) Are you trying to impeach your own witness?
Mr. King: No, but I am surprised from the testimony that she has given here.
Mr. Grinnell: You admit you are surprised then?
Mr. King: Yes. (Questioning witness) Would you be kind enough to straighten this thing out. From all of your testimony there, tell us the size of the individual please, Mrs. Edsinger?

A. When I asked about this man standing it was to show he was stocky built individual. Mr. Atchley is a slight built man. The man I saw walk down the street was a stocky built man.
Q. Was he taller or shorter than Mr. Atchley?
A. He is taller and he is heavier.
Q. Is there any doubt in your mind at all about that?
A. No, there isn't.
Q. Well, then, after this man stood up you were surprised that he wasn't any taller than that, weren't you?
A. No, I wasn't surprised.

Mr. Mulkey: Just a moment, Ma'am, I am going to interpose an objection here, if counsel wishes to take the stand and testify that is all right with me but I am going to object to this entire line of questioning of trying to rehabilitate somebody who obviously has made an error in her testimony.

Mr. King: I feel since the record is in such a condition [fol. 1371] as it is in and since this demonstration has been put on, this witness should be permitted all the latitude that we can possibly give her to establish once and for all a fact, that is necessary to a fact, to establish before this jury.

Mr. Mulkey: Mr. King went for this demonstration, we didn't.

The Court: Mr. Reporter, would you read the last question and answer please, so that I can rule?

(Reporter does as requested:)

The Court: I don't see that that answer is objectionable.

Mr. Mulkey: Your Honor, "You were surprised, were you not, that this man got up and wasn't this" or that or the other, is that not putting an answer in the witness' mouth, I think it is leading, of course the answer given——

The Court: (Int.) All right, the objection will be sustained and the answer will be stricken.

Mr. King: Very well. (Questioning witness) Will you tell us then, in your own words, once and for all, about that individual going down the street that night in reference to, taking into consideration the size of the defendant here.

The Court: For once and for all, we have been over this subject and the witness has already testified and she has seen Mr. Atchley walk and she has seen this other gentleman and we have covered the—she has testified and she has gone over the subject before, there is no need to cover the [fol. 1372] subject of the appearance of the man on that night any further with this witness.

Mr. King: If the Court please the next question I was going to ask her, in your considered opinion on the stand, was that person going down the street Atchley, I was going to ask her point blank that question.

The Court: That has been gone over and gone over in direct examination and cross examination yesterday and was gone over again today and I am going to put an end to that examination. We will proceed with the trial.

Mr. King: Very well, Your Honor. Thank you very much, Mrs. Edsinger.

The Witness: May I be excused?

Mr. King: May we be permitted to recall Mr. McHugh for just a couple of questions?

Mr. Mulkey: I am going to examine this lady if you don't mind.

Mr. King: Excuse me.

Recross-examination.

By Mr. Mulkey:

Q. Do you want to come up here, Mr. Martin. Will you stand right there. Mr. Atchley, you want to stand right by him too. (Mr. Martin and Mr. Atchley stand shoulder to shoulder) You may resume your seats, both of you. The jury have had an opportunity to observe. (Questioning witness). If I were to tell you that Mr. Martin weighs 135 [fol. 1373] pounds what effect would that have on your opinion regarding the man you saw that night?

A. I knew Mr. Martin wasn't a heavy person, but he is generally built——

Q. (Int.) He is generally of a description you saw that night, is that right?

A. Yes.

Q. Mr. Martin is?

A. Except the man was heavier.

Q. That is right, he is of the general description except the man you saw was heavier?

A. Heavier, yes, and taller, possibly, I don't know.

Q. And you did state to us, did you not, that you saw this man, come into the Courtroom and he looked like that man that you saw that night, you stated that to this jury, is that right?

A. Well, the build is generally of the build.

Q. But didn't you state that?

A. Yes, I did.

Mr. Mulkey: That is all.

Mr. King: May I inquire from the witness what she meant by heavier and taller, Your Honor. Your Honor has limited my questioning about the description of the man. I just wondered if I be permitted to ask her on re-direct the question, what did she mean by heavier and taller like she has testified.

The Court: The witness' last answer was the man on the night of the killing may have been heavier but she

doesn't know, he might have been taller, now what is the question you want to purpose?

Mr. King: What does she mean by heavier and what does [fol. 1374] she mean by taller.

The Court: I think everybody understands that, Mr. King.

Mr. King: But I want to ask her the size, the difference in height and the difference in weight.

The Court: I am going to refuse further examination. I think we have been over this subject time and time again with this witness.

Mr. King: Very well.

Mr. Mulkey: That is all.

Mr. King: That is all, Mrs. Edsinger.

[fol. 1375] The Court: Are you prepared to call another witness?

Mr. King: Yes. I will call Mr. McHugh. You have been sworn, Mr. McHugh.

JACK D. MCHUGH, called as a witness by the defendant, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. King:

Mr. McHugh, recalling your attention to the afternoon of November 1st where were you on that day?

A. I was over in Gridley with you.

Q. And what were you there for?

A. I was there to take photographs which we have shown in Court here.

Q. And did you take photographs?

A. Yes.

Q. Were you present with me when we knocked on Mr. Scharsch's door?

A. Yes, I was.

Q. What occurred? Just tell the jury what happened.

A. You asked the boy that was sitting in there watching television if we could come him and take pictures. He said, "Yes, come on in." He opened the door, held it open for us, showed us the bedroom, showed us the window that

he believed his family was looking out of. It was the only window in the room. He sat on the bed while we took the pictures. He then let us out the door and we thanked him very much.

Mr. King: That is all. One more question please.

Q. Did you hear any inquiry about Mr. Scharsch?
[fol. 1376] A. Yes.
Q. What inquiry?
A. You asked if the mother and father were home. The boy said no. He said his family would be home maybe about 5:00 or 6:00 o'clock. It was then that you asked him if we could come in and take pictures.
Q. Wasn't it a fact that I told him that—. I will make it this way——

Mr. Grinnell: Ask him about the conversation.

Mr. King:

Q. We were taking pictures in the neighborhood?
A. That's right.
Q. Now, you hadn't taken the pictures outside the house at that time, had you?
A. We had taken about one or two of Atchley house befor we had gone inside.
Q. But none from underneath the sill of the window or on the sill?
A. No, we had not.
Q. What was said about the desirability of procuring pictures?

Mr. Grinnell: What was said by whom?
Mr. King: By anyone.
Mr. Grinnell: I am going to object as to what was said by anyone.
The Court: I don't see the relevancy of it.
Mr. Grinnell: Or the materiality.
Mr. King: Very well.

Q. Go ahead with the conversation.
A. I asked the boy if we could come in and take the pictures from the window and he said yes, he believed it would be perfectly all right, and held the door open and [fol. 1377] invited us in and showed us the room.

Q. How big a boy was he?
A. Oh, he was about 16, fairly good sized boy.
Q. Would you describe him?
A. Oh, I couldn't very well.
Q. I don't mean his facial characteristics. His body.
A. Oh, he was about six feet tall.
Q. You think he was that tall?
A. About that.
Q. How broad would you say? Was he a developed boy?
A. Yes, he was.
Q. How much would he weigh would you say?
A. Maybe about 170, 175.
Q. You are pretty sure of that, are you?
A. About that, I believe.

Mr. King: That is all.

Cross-examination.

By Mr. Grinnell:

Q. You recall that day very well, do you not?
A. Yes, I do.
Q. It is not too long ago?
A. No.
Q. Just fairly recently?
A. That's right.
Q. And you recall that when you went over there with Mr. King that he asked you to take certain pictures for him over there and that's why you took your equipment?
A. That is right.
Q. And you knew generally what you were going to do when you got over there, did you not? You knew you were going to take pictures of this scene which you did?
A. I didn't know myself when I went over there except [fol. 1378] he said about 20 pictures of the house surrounding to show.
Q. Generally speaking you knew what you were going to do?
A. Yes.
Q. Did you call over to make an appointment with these people before you went over?
A. No, I did not.

Q. However, you knew that you were going to take pictures inside the house, did you not?

A. I didn't at that time.

Q. You didn't? When you arrived at the house—. If this boy were, say, 12 years old that would not in your opinion be impossible would it?

A. No, it wouldn't. When I take pictures——

Q. There is no doubt in your mind he was a boy?

A. Yes, he was a boy.

Q. And a young boy, not a high school boy?

A. He was fairly young. I mean, when I take pictures I don't pay any attention to people.

Q. Mr. King did all the talking, did he not?

A. Yes.

Q. You just went along and Mr. King went up to the door and knocked on it and didn't he ask this boy first of all where his parents were?

A. Yes.

Q. And didn't the boy say, "My parents are not home"?

A. That is true.

Q. And then he asked them when they might return, is that right?

A. Yes.

Q. And he at that time said, "Well, I don't know. My parents are over in Oroville talking to Mr. Grinnell about [fol. 1379] this very case." Isn't that correct?

A. I believe it was

Q. And then didn't Mr. King say to the boy, "I am working on this case also. May I come in and take some pictures?"?

A. I don't recall that.

Q. Don't you recall Mr. King saying after the young boy just got through saying, "My folks are over talking to Mr. Grinnell about the case", didn't Mr. King then say, "Well, I am working on the case also. May I come in and take some pictures"?

A. He said that he was working on the case for Mr. Atchley.

Q. Did he say for Mr. Atchley?

A. Yes.

Q. You are certain of that?

A. I believe I am.

Q. Are you certain, Jack?
A. Yes.
Q. And then you proceeded to take the pictures?
A. Then we proceeded to take the pictures.
Q. And the parents were not home when you took the pictures?
A. No, they were not.
Q. And you took them from inside the house as you have indicated yesterday?
A. That is right.

Mr. Grinnell: That is all.
Mr. King: Thank you.
May we call Mr. Jim Atchley as our next witness.
The Court: Mr. King, before we proceed with Mr. Atchley we will take our morning recess.
At this time, Ladies and Gentlemen, we will recess for ten minutes. Please remember the instructions of the Court heretofore given to you.

* * * * * * *

[fol. 1380] JIM ATCHLEY, called as a witness by the defendant, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. King:

Q. Your full name please?
A. Jim Atchley.
Q. Mr. Atchley, where do you live?
A. I live out here on the Honeut and Palermo road.
Q. How long have you lived in Palermo?
A. About two and a half years.
Q. Where were you born?
A. I was born in Cleveland, Tennessee.
Q. Where is Cleveland, Tennessee?
A. It is 30 miles north of Chattanooga.
Q. What sort of country is that?
A. Well, it is just a little town there. Well, it started in at 12,000 population.

Q. Did you live right in town?

A. No, sir. We lived in the country like. Just about all of our life. Otherwise our father was a farmer.

[fol. 1381] Q. Talking about the terrain, was it level country or not?

A. No, sir. It was hilly.

Q. Mountain country?

A. Mountain country.

Q. How many people live in your little community where you were raised?

A. Well, it just varied up and down. You couldn't say that any certain amount is in the winter and summer. Seemed like they would go south during the cold part and then they would come back over the summer.

Q. Well, about how many families?

A. Well, around us there wasn't too many. About four or five hundred.

Q. In the territory around you?

A. Yes.

Q. And when you include that four or five hundred people, is that people or families?

A. Well, families.

Q. How big a territory would that be?

A. Well, that is not too big of a territory where we was raised. Just a little mountain homes, I would say.

Q. And it wasn't a town? That's what I am getting at.

A. No. But it has come to be a town since atomic bomb has developed there in Chattanooga. It has built up considerably. I imagine it would run around 30,000 now.

Q. But that was through the influx of people coming in to work on the atomic energy plant?

A. Yes.

Q. But when you were—. By the way, you are a brother of the accused, Jack Atchley?

A. That's right.

Q. What is your age?

A. I am 43.

Q. What is his age?

A. 42.

[fols. 1382-1388] Q. You are a couple of years older than he is?

A. I am eighteen months to be exact.

Q. You had another brother Sam?

A. Yes.

Q. How old would he be if he were alive?

A. He would be 39.

Q. He was younger than Jack?

A. Yes.

Q. Going back to your boyhood in Tennessee, I understood you to say that you left Tennessee and came directly here. Did you?

A. Well, we stopped at Indio, California, down there and worked our way on out.

Q. And you got here in what year?

A. Well, in '42, I reckon, whenever I come. And later, why, I went back and got my brother here and brought him out I reckon in '46.

Q. And that was when you were down in the valley in the south?

A. Yes.

Q. Around Indio?

A. Bakersfield.

Q. Now, going back to the little community where you boys were raised—. By the way, how big a family did you have?

A. Well, there was twelve of us.

Q. Boys or girls?

A. Seven boys and five girls.

. . . . . .

[fol. 1389] Q. And leaving that subject for a moment, did you have a conversation some week before, in the early part, calling your attention to the early part of the week before the shooting, at Gridley, with Kay, Jack's wife?

A. Yes, I think it was on Thursday or Friday, I wouldn't be positive which day it was she drove up in my front yard [fols. 1390-1391] and says, "I am available for another husband".

Q. Go ahead and tell us what she said then?

A. She said, "Me and Jack has separated" and I wouldn't definitely say that she said any more than that only just said, "Me and Jack is definitely separated" and that she was available for another man and I didn't have to look

for a killing, like it was in my other brother's case, that it was going to be different this time.

. . . . . .

[fols. 1392-1393] Cross-examination.

By Mr. Mulkey:

Q. Now do you own a pistol, Mr. Ackley?
A. Yes, sir.
Q. Do you carry it with you all the time?
A. No, sir, not all the time.
Q. Do you carry it now with you?
A. Now, no.
Q. Do you have a permit to carry a pistol?
A. No, sir.
Q. When do you carry it?
A. Well, I don't carry it here, like I did when I was home, if that is what you mean.
Q. I am asking you if you carry it here, you don't carry it here like when you were at home, do you?
A. No, I don't carry it here like I did.
Q. And you have lived here, or at least in this state since the year 1942 or something.
A. Something like that, I wouldn't give a definite date.
Q. Bringing your brother out here, the defendant, in 1946.
A. That is right.
Q. And he has been here since 1946, which would be roughly 12 or 13 years, somewhere in there?
A. Somewhere around there.

. . . . . .

[fol. 1394] Q. You have been in this particular matter, have been quite associated with your brother trying to help him out in his defense, have you not?
A. In his defense, I just set and heard it the same as any body else.
Q. Well, you have conferred with him at various times over in the jail working out matters of defense, didn't you?
A. Well, I just conceded for his lawyer.

. . . . . .

[fols. 1395-1410] Mr. Mulkey:

Q. You did discuss the matter of defenses with him down there in the jail?

A. Yes, we discussed about my other brother, we talked about that a whole lot.

* * * * * * *

[fol. 1411] Mr. Veron Atchley, a witness produced on behalf of the defendant, after being first duly sworn testified as follows:

Direct examination.

By Mr. King:

Q. Your Name is Veron Atchley?

A. Vern Atchley, yes.

Q. And your friends call you Jack, do they not?

A. Most of them does on account I had my used car lot under "Jack's Used Cars".

Q. And where were you born, Mr. Atchley?

A. Cleveland, Tennessee.

Q. And where is that place in relation to Chattanooga, Tennessee?

A. That is 30 miles north of Chattanooga.

Q. Were you born right in the little town?

A. No, I was born out in the country, not right in the main part of Cleveland, it was in the country.

Q. Now you have heard your brother describe the terrain here, what sort of country was it?

A. Well, it was mountain country where we was farming at that time.

Q. And when did you leave the country in Tennessee?

A. Well, I left the country and come out here in about 1945 or 1946 I guess, I don't know, somewhere in that neighborhood.

Q. About 21 years ago?

A. About 21 years ago.

Q. Or thereabouts. Now how old are you now?

A. 40—going on 42.

[fol. 1412] Q. Now how large a community were you raised in in Tennessee?

A. Well, the town that was nearest to us was about anywhere from 10 to 15 thousand population.

Q. How far away was that town?

A. We was about 15 or 20 miles out in the country, in the mountains, from the town.

Q. Now did you have brothers and sisters?

A. Yes.

Q. And how many?

A. I had 5 sisters and 6 brothers besides myself, made 11, 12.

Q. There were how many?

A. There was 12 of us all told.

Q. Are your mother and father still living?

A. My mother is, my father has been dead for a number of years, about 20 years.

* * * * * * *

Q. Now in your little mountainous community as you have testified, did you go to social affairs?

A. Yes, we went to church out there in the country where they had a little church there.

Q. What church by the way?

A. It was a Baptist Church.

Q. Now did you go to any other social affairs in your young life?

A. Well, we went to dances and stuff like that, if that is what you are referring to.

Q. Now calling your attention to your experience in early life in Tennessee, were you familiar with guns?

A. Yes, we was raised up with guns.

[fol. 1413] Q. Did you, when were you first—when was your first time that you had a gun?

A. Well, I would say I had a rifle when I was 10 to 12 years old, a rifle.

Q. Did you ever own a pistol when you were young?

A. I owned a pistol when I was 14.

Q. And over the years that you have lived in Tennessee did you own more than one pistol?

A. I would say that I could have owned four or five pistols in the period of time in Tennessee.

Q. Did you develop any particular knack with a gun?

A. Well, the only thing when we went to those country

dances we always taken our guns with us, when we went out there to those big houses, those house parties with a dance and then if we got into it out there, fight or anything like that, if they wanted to throw their guns off and battle it out why we would do so.

[fol. 1414] Q. I notice a scar on your lip, on the left side of your lip.

A. Yes.

Q. Would you explain where you got that?

A. I got that at one of them dances, at a party, that is when we put our guns to one side and just battled it out with fists.

Q. And then what did you do with the guns?

A. Well, when we got through we got up and shook hands and got our guns and put them back in our belts.

Q. And what kind of guns?

A. Well, I have even had a 32 and a 45 and this pistol here that they have here.

Q. That is your gun?

A. Yes.

[fol. 1415] Q. Yes, what kind of a rifle was that?

A. Well, I had a 22 automatic rifle and I had a 30-30 Winchester deer rifle during—I had it last deer season.

Q. Have you ever been arrested for a violation of any of the criminal laws here in California?

A. No, sir.

Q. Recalling to your attention and refreshing your memory please, do you know what 502 is?

A. I really don't know what it is but I know what I got fined for at one time.

Q. What was it?

A. $250.

Q. I mean what was the charge?

A. Drunk driving.

Q. Oh, yes, that is what I wanted you to remember, you were arrested one time for drunk driving?

A. Yes, sir.

Q. How long ago was that?

A. That was back about 1952 I believe.

Q. And was there any other—have you ever been in trouble with that exception?

A. I have been arrested for disturbing the peace, drunk and disturbing the peace.

Q. In this state?

A. No.

Q. Where?

A. In Tennessee.

Q. And that was when you were a young boy?

A. Yes.

Q. Was that on many occasions?

A. No, not on many occasions, it could have been, I would say, two or three times that I got arrested for disturbing the peace.

Q. And that was up to the time you were about 20 or thereabouts?

A. Yes.

Q. Going back to the guns, would you class yourself as a [fol. 1416] good shot with a revolver?

A. Yes, sir, I can shoot a revolver pretty good.

* * * * * * *

Q. Now how long did your formal education last, meaning by that, how long did you go to school?

A. Well, right off handed I maybe went two or three months out of a year, I will say, like that, maybe four months, I won't say just exactly.

Q. I meant what grade?

A. I went past out of the third into the fourth.

Q. Did you attend the fourth?

A. No, sir.

Q. Now, Jack, I am going to ask you, can you read?

A. No, sir.

Q. Can you write?

A. No, sir.

Q. Can you write your name?

A. Yes, sir, I can write my name.

Q. Can you read the newspaper?

A. No, sir.

Q. Well, how do you gain your information for instance from what appears in newspapers?

A. Well, sometimes the newspaper is right and sometime they are wrong.

Q. No, I say if you refer to an article in the newspaper, you said you can't read a newspaper, how would you find out what was in the newspaper for instance, if you wanted [fol. 1417-1419] to find out what was in it?

A. Well, I couldn't unless I had somebody read it.

Q. You would go and ask somebody to read it for you?

A. Yes.

Q. How about other kinds of papers, referring to contracts and things of that sort?

A. The contracts, the secretary took care of all of them.

Q. Well, I know that, but while—you are perhaps referring to Jewel, in your business?

A. Yes.

Q. But referring to other papers that you signed in the past and you perhaps have signed a good many, have you not?

A. Yes.

Q. You have to have people read those to you?

A. Yes, if they are just buying cars and stuff like that they don't have to read them to me because I know just exactly what I am paying for them when I buy them.

Q. You can read figures, can you?

A. Yes.

Q. But you can't read the printed words?

A. No.

Q. Can you read longhand?

A. No, sir.

. . . . . .

[fol. 1420] Q. Will you reconsider? You said, so you won't be confused about dates—they are always important ——. I am talking about Shafter now please. You said that you moved to California in '43.

A. Well, I first came to Indio in '43 and we stayed there about three weeks and then we came on down to Shafter, the rubber plant there—I mean, for growing this rubber for the plant. So I got a job there irrigating this rubber.

. . . . . .

[fol. 1421] Did you say you stayed in Shafter for how long?

A. I don't recall how long we stayed in Shafter. We stayed there until—I believe we quit irrigating rubber, then moved to Modesto and worked in Modesto cannery out there—Turlock and Growers—I believe that is the name of the cannery.

* * * * * * *

Mr. King:

Q. How long did you work in the cannery?

A. Well, we worked there that season until the cannery closed.

Q. That would be up to about the winter of '44, is that about right?

A. It was up to about '44, I suppose.

Q. Then what did you do?

A. Well, I think that we went from there up to Frisco.

Q. Up to San Francisco?

A. Yes.

Q. What did you do up there?

A. I work in the shipyards.

Q. And do you remember the name of the outfit you worked for?

A. The Western Pipe and Steel I believe.

Q. How long did you work there?

A. I work there going on two years.

[fol. 1422] Q. What was your occupation there?

A. As a welder.

Q. Using a welding machine on steel?

A. On steel and welding the ducts and stacks and stuff like that.

* * * * * * *

Now, when did you first meet Kay?

A. That was in '53 I am quite sure.

Q. Where did you meet her?

A. I met her out of Fresno down there, the little old town called Calloway.

Q. What place did you meet her?

A. In a bar there at Calloway.

Q. Were you married at the time?

A. No, sir.

Q. When you met her did you know she was married or living with anyone at that time, that day that you met her at Calloway?

A. She told me the man she was living with was in jail. I believe it was in Visalia or Fresno. I don't know which. It's been so long back now.

Q. Did you go out with her on that occasion?

A. I went out with her that night, yes.

[fol. 1423] Q. What time in the day did you meet her?

A. It was at night.

Q. It was in the evening?

A. Yes.

Q. Do you remember what time it was?

A. It was 9:00 or 10:00 o'clock at night if I recall right.

Q. Sometime along in the early part of the evening or 9:00 or 10:00 o'clock at night?

A. Yes. It was at night. I remember it was at night because I just had got off from work in Fowler.

Q. Now, what I am getting at, did she tell you she was married or not on that first occasion?

A. She told me she wasn't married. She had been living with a man named Bud Jones.

Q. Does he have any other name?

A. Braxton is what she called him all the time.

Q. And you have since found out that he goes by the name of Bud Jones?

A. Yes.

Q. You went out with her that night?

A. I went out with her that night, yes.

Q. Did you have any relations with her that night?

A. Yes, I would say yes.

Q. All right. Now, when was the next time you saw her after that?

A. I made a date with her for Friday night. That was on Wednesday night, if I can recall back that far. It was through the week night the first night I went out with her.

Q. Did you keep a date with her in the middle of the week?

[fol. 1424] A. I made a date with her for Friday night.

Q. Did you keep it?

A. Yes. I went back over and met her at the same place that I picked her up at the place before.

Q. And that is the second time you went out together?

A. Yes, sir.

Q. Did you have relations with her that night?

A. Yes, sir, I think so.

Q. When did you discover that she was a woman with children, if you did?

A. Well, I went home with her the first night, took her home the first night. She lived back of the bar, around back in an apartment, just say an apartment, just two-room apartment four or maybe more or less. I couldn't say for sure. Two-room or three room apartment. I don't know which it was.

Q. And you took her home that night?

A. The first night, yes, sir.

Q. And what about the children? How many children?

A. She had two. Three.

Q. And what ones are they, if you can identify them as we have used their names here in the courtroom?

A. Ernest and Barbara and Donald.

* * * * * * *

[fol. 1425] Q. How many dates did you have with her along about that time, not going through each one but just generally if you can remember?

A. Well, that would be hard to say in that order how many I had. Maybe, five, six, something like that. Maybe more. I don't know.

* * * * * * *

[fol. 1426-1428] Q. Very well. I take it when you stopped going out with her did you people have a quarrel or something?

A. No, sir. I quit my job down there and moved up here to Oroville then.

Q. Now, did you move directly from Fresno to Oroville?

A. Yes, sir.

* * * * * * *

[fol. 14[illegible] Q. When did you next see Kay after you moved out of the San Joaquin Valley and moved into Oroville?

A. Well, the next time I seen her she came out to the bar I owned down here to Palermo.

Q. Where you owned, did you say?

A. Yes.

Q. Did you own the bar there at Palermo?

A. Yes.

Q. How long did you own it?

A. Well, I just kept it about two months.

Q. Then you sold it, did you?

A. Yes, sir.

Q. To the present owner?

A. Mr. Bean, George Bean.

* * * * * * *

Q. When did you first acquire the three houses out in Palermo that have been talked about and identified in evidence here?

A. Well, I bought two lots from George Pearson there, naked lots, and give him $600 for the two lots. Then I [fol. 1430] bought the other three lots through the state down here. I bought it and come down here and deposited the money down here at the state and bought the other three lots there.

Q. Do you remember when that was?

A. I believe that was in '55. I am not for sure of it but I believe, the best of my knowledge, it was in '55.

* * * * * * *

[fol. 1431] Q. Who was Jewel Spoon—rather who is she?

A. Who is she?

Q. Yes. She is still alive as far as you know?

A. Yes, yes.

Q. Where is she living now?

A. She is living in Fresno somewheres. I don't know just——

* * * * * * *

Q. It is your best memory that you met Jewel after you came here—rather, Selma, is that right, before you moved

[fol. 1432] here or afterwards?

A. Well, I would say that I had met her at my brother's place down there. But I ain't saying I went with her or anything like that. I just say I met her.

Q. Well, when did you first start going with her?

A. Oh, that was in some part of—I believe around '54. I am not positive of it. I believe in that neighborhood, around '54.

. . . . . .

Q. I understand. All right. Now, when did you first go out with Jewel?

A. Well, I would have to put it this way: That I went down to my brother's place down there and she was down there and I got to talking with her and we went out that night and she made up her mind to come back up here and keep books for me, up here when I was down there.

. . . . . .

[fol. 1433] Q. Well, we can put it this way. After you left this trailer house at your brother's place did you move back out to Palermo?

A. Yes. I moved out to Palermo, out there to old man Keesling's, the man that died that I bought the property off of.

Q. Which property?

A. That's them three lots.

. . . . . .

[fol. 1434] Q. What was your relationship with Jewel? Was it an intimate relationship?

A. It was just more of a relationship of a transaction business. I did——. Now, what do you mean by——.

Q. I meant to say were you sweethearts?

A. Well, we talked about getting married at one time, yes.

Q. In other words, what was your regard for her?

A. My regard that I give the money down here at Mr. Morrow Steadman's for a divorce for her.

Q. For her?

A. Yes.

Q. She was married?

A. Yes.

[fol. 1435] Q. And you wanted to marry her at one time?

A. I was going to marry her at one time, yes.

Q. And that was before Kay showed up?

A. Yes.

Q. The second time?

A. Yes.

Q. On the second occasion?

A. Yes.

* * * * * * *

Q. Now, you and Jewel lived there up until what time? Did you build the houses in the meantime?

A. Yes. I built the big house first.

Q. All right. And then you built the other two houses? Is that what I take from what you say?

A. Yes. I built the other two houses after I built the big house.

* * * * * * *

Q. All right. Now, did you employ people to assist you in building the houses?

A. Yes. Boot Dodson, he is the one that built my big house and I bought two houses and only got one.

* * * * * * *

[fol. 1436] Q. But you finally did get the two houses up. Now, I am —. I mean the three houses up. Now, I am trying to talk about who worked for you out there. You say this man Dodson and who else?

A. Dodson, he worked for me on the big house.

Q. Yes.

A. And Danny DeCamp and Joe Fuller and Mr. Chase worked on the other two houses.

Q. And do you recall employing anybody else right now?

A. Well, the Loomis boy, he worked with Joe Fuller I am sure, the best of my knowledge.

Q. Now, relative to the time that you and Jewel were living in the big house as you testified you were in the used car business, were you not, about that time?

A. Yes, sir.

Q. You had gone in sometime previous to that while you were building the houses? You in the used car business?

A. Yes.

. . . . . .

[fols. 1437-1438] Q. Did you have relations with her nine months before the child was born?

A. Yes.

Q. Where?

A. In Fresno.

. . . . . .

[fol. 1439] Q. And when did you first start living with Jewel up here? When you were out to Sam's? Is that what I am to understand?

A. Yes. That was in '55, I would imagine, the first part of '55.

Q. All right. And then you moved out to the big house and stayed there until Kay showed up, is that it?

A. Until Kay showed up.

. . . . . .

[fol. 1440] Q. What is the first occasion she come to the house in Palermo?

A. She was wanting to buy a car. She woke me up out of the bed. Jewel, she come in there and woke me up and was—I was in bed asleep because I run the bar and trying to sell cars too, you know—and I got up and I talked with her a few minutes and she told me she didn't have very much money to pay down. She had as much as $50 she [fols. 1441-1444] could pay down on a Friday on a car and so I told her I would go along with her. And I asked her how much could she pay a month, and she said she could pay $50 a month. And then she took the car out and it went haywire or something and then she brought it back and I completely had the crank shaft turned on it. She throwed a rod out of it and had the crank shaft turned on it and new rings, new valves, inserts all the way through, put in it, and it was all right then. And then she wrecked it.

Q. Well, now, wait a minute. Did she come back afterwards?

A. After she got it overhauled she came back afterwards. She had run into a truck and trailer or something with the car.

Q. When she came back after wrecking the car did she find out that Jewel was living with you? When did she first find out? I will ask it that way. Withdraw the other question. When did she first find out that Jewel was living there in the house with you?

A. Well, she knew it the first time she was over there when she come to buy the car because Jewel come out of the house, out there to the office to make out the papers on the car.

Q. And Jewel made out the papers for the sale of the car?

A. Yes.

. . . . . .

[fols. 1445-1450] Q. Did anything happen that day?

A. Well, her and Jewel was in there arguing about something and I got up to find out what it was all about.

Q. Did you find out?

A. I found out what it was all about.

Q. What was it?

A. She told Jewel that she was going to take me regardless, see, away from her in the front room there, and Jewel got an ash tray up and ordered her out of the house and throwed the ash tray at her.

. . . . . .

[fols. 1451-1454] Q. Do I take it when Kay moved in she moved her family in with her?

A. Yes.

Q. And your child along with the other children?

A. Yes.

Q. Jewel according to your testimony heretofore moved out to the trailer house when she moved in?

A. Yes.

. . . . . .

[fol. 1455] Q. What did she want to move over there for?

A. Well, she said it would be more better for her to move

over there on account of the kids, the welfare, they going to [fol. 1456] catch her out there and they were fussing and arguing with her about her living out there.

Q. Well now, right at the start, let's ask, did you ever sign any receipts that she showed to the welfare office?

A. No, sir, I never have signed a receipt in my life for no house rent receipt yet.

Q. Did you ever charge her any rent for the house while she was there?

A. No, sir, when I taken her back to Arkansas and I paid the trip all the way back there and back, she did, when we got back and she got her check, she made an $85 payment on my place.

Q. You owed some money on the place, did you?

A. I owed about $6,000.

Q. Well, I mean there was an installment due when you got back from Oklahoma, from being married, is that the time?

A. No.

Q. That was another trip?

A. That was about a month before this whole thing occurred.

Q. That was after you were married?

A. Yes.

Q. And she put up $85 out of her welfare money so that you could make a payment on the place?

A. Correctly.

Q. How much was she getting in welfare?

A. $260 I believe now, Mr. King, I didn't—I never did look at the check, but that was what she would say and so I presume it was $260, I will put it that way.

Q. Going back to the time that Mr. Fuller was working [fol. 1457] for you out there and calling your attention to the deer hunting season, there is testimony here that you heard, regarding an episode concerning a 30-30 rifle, will you tell the jury just what happened that time.

A. Well, me and Mr. Fuller, we took off hunting that day about noon and we didn't get in about, I don't recall just when we got in, but it was bedtime, I know that it was bedtime and so my office door was locked, with the little bed in there, I could have slept on in there, and she had the front door locked, I went up and turned the lock on

the door and she wouldn't open the door and I went back out to the car and laid down in the car.

Q. You say you went up to the door, that was at the big house where she was living?

A. Yes.

Q. And then what happened?

A. And then I went back to the car and I laid down in the car and started off to sleep and she came out there with this 30-30 rifle and told me, "If you don't get out of the car and go in the house I am going to kill you, you son of a bitch".

Q. And how did she say it?

A. How did she say it?

Q. Yes.

A. That is the way she said it.

Q. Well, did you feel she meant it?

A. Well, I felt like she did or I wouldn't have gotten out of the car and went in the house, and her with the gun right on you.

Q. Do you know whether or not the gun was loaded?

A. Well, yes, the gun was loaded, because I taken the cartridge out of it, we went in the house and I unloaded it [fol. 1458] and took the cartridges out and stuck them in my pocket and the next day I locked them up in the office.

Q. In other words when you got the gun away from her after you went in the house you unloaded it, did you?

A. Yes.

. . . . . .

[fol. 1459] Q. I see, how many times after she moved out to the big house out there to Palermo even before you married her and after you married her, did she move out of the big house?

A. Oh, she has moved out about three or four times I would say and then wanted to move right straight back, when she moved out, she wouldn't let me alone, she would run all around and come over to the bar, over there and up to the store and back around by the house there and everything to get me to go over to the house with her and [fols. 1460-1463] if I didn't do that she would call me on the phone and then I would finally go over and see what she wanted.

Q. And then she would move back in again?
A. Yes.

. . . . . .

[fol. 1464] Q. How did you feel toward her?

A. Well, I loved the woman myself, I will say that, I loved her, if I hadn't of I wouldn't have went along like I did, I would have just gotten up and walked off a long time ago and just left everything, and when she tried to break me, she would get the pi slips and all that stuff and try carrying them off and I couldn't sell no cars and no nothing.

. . . . . .

[fol. 1465] Q. Did she do your book work for you?

A. Kay had never had done none of my book work, Jewel had done all of my book work all the time I was in the car business. The only thing Kay had done for me, she had made out receipts for the money that was coming in, if I wasn't there the oldest girl or, if she wasn't there, the oldest girl would make them out.

. . . . . .

[fol. 1466] Q. You just made a fast trip back and forth, is that right?

A. Yes.

Q. And your brother was buried at your home in Tennessee?

A. Yes.

Q. Now referring to that happening in relation to Kay, did Kay know about it or do you know?

A. Yes, she knew all about it, the one night that she had been out to the bar there and she was pretty well drunk [fols. 1467-1468] and she run in a ditch this side of my brother's house and he got the wrecker and pulled the car out of the ditch.

. . . . . .

[fols. 1469-1477] Q. Did you ever beat Kay?

A. No, sir, the only time I ever hit her in my life, just partially slapped her then was over there the night she

broke the back glass out of my car and carried my clothes home.

Q. You did slap her then?

A. Yes.

Q. But you never laid hands on her at any other time?

A. No, not that I can recall, not that I can ever recall.

* * * * * * *

Q. Then I take it your statement is that you have never threatened her life?

A. Yes.

* * * * * * *

[fol. 1478] Q. But you hadn't had any quarrels with Kay over that welfare deal?

A. Well, yes, quite a few of them.

* * * * * * *

Q. Did you talk to Mrs. Anderson about that?

A. I told Mrs. Anderson over there that I tried to get her to get off of it herself and she wouldn't do it, she wouldn't go along with it no way.

* * * * * * *

[fols. 1479-1484] Q. All right. Now, had they cut her welfare? Or do you know?

A. No, not as I know of. I never did fool with her checks or mail or money, either one. She took care of her own money. I didn't have nothing to do with that.

Q. Well, did she use it for household expenses?

A. Sometimes she would buy a car, maybe cost $150, and then one month there she didn't have nothing to buy the kids, no clothes or no shoes, and I went over to Marysville and I think I have the cancelled check stubs today in my glove compartment of my car if they didn't take it out to show for that.

Q. Did you take her along?

A. Yes, sir.

Q. And took the kids?

A. No. We knew the size to get for them and so the cancelled check stub is there to show for it.

Q. All right. Then did she spend her money for groceries or for the house?

A. Yes, sir. She spent some of the money for groceries for the house, yes.

. . . . . .

[fols. 1485-1486] Q. Well, now, I take it that you had had some words and some disagreement that Thursday morning. Was it Thursday you move- to Gridley?

A. Thursday evening.

Q. Thursday evening?

A. That was Thursday morning we had the little argument in there about the kids getting the dishes done.

. . . . . .

[fol. 1487] Q. All right. What did you talk about out to the car?

A. We was talking about—she was—said, "I am still mad at you." I said, "What about?" And she said—kept standing there and talking, talking, and we talked a few minutes longer and she told me, well, she wanted to go to the dance at Robinson's Corners Saturday night.

Q. Yes.

A. And asked me would I come over and go over there with her at 8:00 o'clock. I told her if I could I would. So I fooled around there at the house and Roy Johnson, I believe, he was by the house there and I was sitting there in the car talking to him and the gentleman across the street, he hollered for me to come over and have supper with him, Mr. Thomas, I believe, if I recollect right. I went over and had supper with him and I fooled around until it was too late to go over to the house. I knowed she was probably already over there after I didn't go.

Q. Did you know that she at that time—that she had gone to the dance with the Wagners?

A. No, I didn't.

[fol. 1488] Q. Were you in the bar there when Mr. Wagner came back, when they came home to get the money as they have testified here?

A. That must have been when they was going to Robinson's Corners?

Q. Yes. You saw Wagner there at that time?

A. Yes. But I didn't know——. She had him stop there to get a Pepsi-Cola to see if I was with somebody or something is what she had him stop for.

Q. All right. Then after you left the Dog House where did you go?

A. Well, I taken two boys, Clint Roulette out to his house. There wasn't nobody there, and so they—just taken them on over to his sister, so I took them on over to his sister's. And he got some money. And then he wanted to go back down to the Little Shamrock, so we went back down to the Little Shamrock and we had two or three mugs of beer while we was there. I don't remember just exactly which, two or three I would say. And we went on the outside and I started to back out and I had a flat tire and I pulled it back up to the curb. We got out and jacked it up and changed it and somebody come in—I don't remember who it was not—and Clint asked him was he buying or was he going to be one, or something—I forget now just exactly what it was—but I remember him asking in that there social words was he going to buy one or be one. And he told him yes, when he got that flat tire fixed. I believe that was Freeman Lunby's brother-in law he was talking to.

[fol. 1489] Q. All right then. Where did you go after you got the flat tire fixed?

A. Well, I went back in the joint there and Clint and them had another beer, this other kid, I didn't know the other kid at all, I didn't know him at all and so he went home with Clint, but I still don't know the boy and then I came back out to Palermo, ~~out by, around this~~ other way and back out to the bar, out to the bar in Palermo.

Q. Did you go in there?

A. What?

Q. Did you go in the bar in Palermo?

A. I did not go into the bar, I didn't go into the bar, and at that time I went straight on over to Gridley.

Q. What time of night was this? Do you know?

A. Well, I would say that was about, I would say somewhere around 1:00 o'clock, Mr. King.

* * * * * * *

Q. You say you went over to Gridley. What did you go to Gridley for?

A. Well, I went over there, I went by the Robinson's Corners there and their car wasn't there and I just went over to the house. I thought, well, she is over at house.

[fol. 1490] Q. You were looking for your wife, were you?

A. Yes. And her car wasn't at the house and I went down by the house and drove back through the alley and pulled up there and parked on the right hand side and walked down to the house.

Q. All right. Now I am going to ask you where was your gun all this time?

A. My gun was in the glove department of the car.

Q. How long had it been there?

A. Well, it had been in there all day, Mr. King.

Q. What kind of a car was that?

A. It was a Hudson.

Q. A Hudson?

A. Hudson.

Q. So when it has been referred to here in the pictures and so on as a Nash that is not correct?

A. That is not correct.

Q. It is a Hudson?

A. It is a Hudson.

Q. But that car that you have seen here, shown to the jury, is the same car?

A. That is right.

Q. We are not disputing that wasn't the car?

A. No, I am not disputing it wasn't the car, but it is a Hudson.

Q. They do make the Hudson Rambler?

A. Yes. It says Hudson right on it.

Q. Did you own the car at the time?

A. Yes, sir.

Q. You have since done what with it?

A. I let my brother have it on some money that I owed him.

Mr. King: We will go ahead while Mr. Grinnell is looking [fol. 1491] at that (handing document to Mr. Grinnell). (Questioning witness) All right. Then you say you went over to Gridley. What time did you get there?

A. Oh, I would say in the neighborhood of about somewhere around 1:30 or 1:15, 1:30, somewhere in that neighborhood.

Q. Between 1:15 and 1:30?

A. Yes.

Q. And then did you go to the house?

A. I walked down to the house and pecked on the front door and there was nobody answered.

Q. Which way did you go down there?

A. I walked back down the same way that Mrs. Thomas testified the first time here that, the first time I was over there, I went the same way I did the other time.

Q. In other words, what Mrs. Thomas, you were the person she saw come down there, is that right?

A. Yes, at that time.

Q. Yes. Now what did you do at that time?

A. Well, I turned around and walked right back up the street back to the car and drove back to Oroville.

Q. All right. Now when you went over to the house what did you do?

A. When I was over at the house the first time?

Q. Yes.

A. I just knocked on the door and nobody answered the door, the porch light was on and I figured that maybe she had car trouble or something, her car wasn't there.

Q. All right. Then you say you went, you drove away [fol. 1492] and went to Oroville?

A. Yes, sir.

Q. Which way did you go home? I mean come back to Oroville?

A. Well, I come back by Robinson's Corners and by the Palermo Inn, by the Hut and down by the Little Shamrock and then back out by the Dog House.

Q. Are those places where you thought you might find your wife?

A. Yes.

Q. When you went by Robinson's Corners on the way out did you stop there to look?

A. I stopped to look at Robinson's Corners, yes, I did.

Q. And were they still open?

A. They were still open the first time, yes.

Q. All right. Were there many cars around?

A. Yes, there was quite, several cars there when I was out there, yes.

Q. What kind of a car did Kay drive?

A. 1950 Ford, a business coupe is what it was.

Q. And you, being in the car business, I take it, you could identify it rather readily?

A. Yes.

Q. Did you look at any other place other than these bars in Oroville and Robinson's Corners for her car?

A. Yes. I come down by the Pastime in Gridley, as I come, as I was leaving there that night the first time I was over there.

Q. How about the streets and so on?

A. I looked down the streets there as I come down and I didn't see her car nowhere.

Q. How about the streets out in the country roads?

[fol. 1493] A. I looked all the road as I was coming through all the way back and I never did see her nowheres parked.

Q. Up to the time you went to Gridley had you ever been warned or advised that your wife might be going with some other man?

A. Yes, I have. My—the oldest daughter had told me so.

* * * * * * *

[fol. 1494] Q. Was that the first time you had been advised that your wife might be running around with some other man?

A. No, I had been advised before but I didn't pay any attention to it, before the daughter told me, and after the daughter told me I felt suspicious of the—of it then, but I didn't pay too much attention to the other people talking but you wouldn't think her own daughter would have told you if it hadn't been so.

Q. Yes. Well now when you got over to Gridley the first time and didn't find her home, didn't see her car, I take it you didn't see her car in the carport?

A. No.

Q. And the light was on?

A. The light was on.

Q. You say you went back again?

A. Yes.

Q. And what did you do?

A. Well, when I went back the second time, Robinson's Corners, it was closed, everything was closed and when I

went back to Gridley the second time I pulled up there and pulled my car over there and parked it and I walked down to the house like I did the first time and I would say I was there five or ten minutes or maybe it could have been a little bit more, I don't know now, I won't say either way but it couldn't have been very far from that time because if that, if I had been over and the fire whistle went off I would have heard it.

[fol. 1495] Q. What did you do there the second time?

A. I went up to the door and pecked on the door again, I thought she might have come in and the car wasn't there.

Q. Yes.

A. And so nobody answered so I walked back to the back of the house there.

Q. How about—do you know of a little shed there—by the way, I am going to interrupt now please?

A. Yes.

Q. And what is that little shed?

A. Well, it was for a little woodshed, kindling shed and stuff like that. And I had to go to the bathroom, I will put it that way, and there is nowhere else to go and I had to go right away so I went in that little building back there.

Q. And after you went to the toilet as you say what did you do?

A. I come out and I walked back towards the front of the house and she hadn't come in by then and then I went back to the back of the house and walked down the alley and then back up the little walnut tree there and then she drove in.

Q. When you were standing in the back of the house you saw the lights drive in?

A. Yes, when I was standing in the back of the house at the little walnut tree back there, the little walnut tree was something like that (indicating).

Q. You are indicating about four inches, are you?

[fol. 1496] A. Yes, something like that, three or four inches.

Q. When you saw the car drive in did you see the people in it?

A. No, sir, I didn't see the people in it, I seen it was

the car and I walked to the front, the corner of the house there and she approached up to the front of the house and I stepped out right in the little concrete block-way there, it sets up there.

Q. Now, there is a concrete block in front of the house?

A. Yes.

Q. And then there is a concrete walk-away?

A. That is the walk-away where I was at.

Q. All right. Did you step up on the concrete block or not?

A. I don't think I did.

Q. All right. Now let's go back. When did you take the gun out of your car?

A. Well, I had it the first time I was down there, Mr. King, and I had it the second time I was there in my belt.

Q. You put it in your belt?

A. Yes.

Q. How did you do that, just pull it down in the belt?

A. I just pulled it down. If you give me the gun I will show you how it was and there won't be no—(Defendant demonstrated with gun). This is just about the way the gun was sticking, like that.

Q. How was your shirt?

A. My shirt was on the inside just like it is now.

Q. I see. All right. And then what happened?

[fol. 1497] A Well——.

Q. You have got to a point where you stepped up towards the front.

A. Well, I reached over to hug the woman and when I did she grabbed the gun.

Q. All right, be seated please. And would you hand me the gun. Now did you get your arms around her?

A. No, sir, I didn't get my arms around her.

Q. All right. Where were you relative to the front door when you stepped around the corner of the house?

A. I was just right at the very corner of the house.

Q. When you saw her come through the gate, is that what you are testifying?

A. Yes.

Q. And then you advanced to meet her?

A. I met her and I said, "Honey, where you been so late?"

Q. What did she say to you?

A. The best I can remember she said, "None of your goddamn business" or something, I don't know, I don't remember just exactly the words she did say, but "None of your goddamn business" or something like that.

Q. And then you say you had the gun in your belt and you were going to put your arms around her?

A. Yes, sir.

Q. And then what happened?

A. What happened? She grabbed the gun and pushed me back.

Q. Well, now, which hand did she use to grab the gun?

A. She used the gun with her left hand.

Q. Did she get the gun?

A. Yes, sir, she got the gun.

[fol. 1498] Q. All right. And then what happened?

A. What happened? I grabbed the gun and we was scuffling over there and I don't remember just where it was, two shots, three shots or whatever it might have went off during the time when we was scuffling over it.

Q. And then what happened?

A. Well, what happened? I looked up and I seen this guy the other side of the car, there on the other side of the Ford, he had on a light shirt and I would say to the best of my knowledge he had on a khaki pair of pants or a similar light pair of pants, whether it was khaki or not, he had on a light pair of pants, I don't know.

Q. The man on the other side of the car, what did he do while you were scuffling there, if anything?

A. He didn't do anything, he walked towards the back of the car.

Q. Yes.

A. And then he took off across the street there and I don't know whether I shot at him or not, I think I did, I don't know, after I got the gun into my possession really, I don't know whether I snapped it at him or whether I shot at him one time or whether I hit or not, I wouldn't say.

Q. Would you recognize the man?

A. I don't know whether I could recognize the man or not.

Q. Now what kind of a night was it?

A. It was a moonlight night and then that bright light there in front of the house.

[fol. 1499] Q. You could see that the man was standing through the glass of the car?

A. Standing on the other side of the car through the glass.

Q. Now when he took off how did he take off?

A. Well, he took off in a good fast walk, he wasn't, he wasn't fooling around, and then he got on out there and he started running after I shot at him. I am sure I shot at him or I think I did. I am going to put it that way now. I think I did.

Q. Do you know how many shots actually went off that night?

A. I actually don't know because the gun, it will hold ten cartridges or nine cartridges and I don't know how many cartridges was in the gun.

Q. By the way, while you were scuffling with Kay the gun went off three times?

A. Yes.

Q, And did it go off any more?

A. Yes, it went off to the best of my—the only thing I can give, actually of when I seen this man, I don't know where it went off, I mean about the other two shots or not, but maybe it did. I will testify that way about it.

Q. You don't know then?

A. I don't know but I suppose it did because when I snapped it at him, I don't know.

Q. And then what did you do?

A. Well, I stood there a minute and looked at her, directly turned out the gate, I seen she was dead and I turned and walked out the gate and started up towards my car.

Q. How about the other man?

A. The other man, he took off down the street running [fol. 1500] when I got out in the road.

Q. And then you went back to your car?

A. I went back to my car.

Q. Now when Kay walked up to the door did you see anything of any keys?

A. I didn't—I just remember the keys but I don't—she had some keys around her fingers. I think it was around her fingers, in the key ring, I am not for sure of that, I am

not sure of that, I ain't going to state one way or the other. I know she had some keys in her hand, or she did or didn't, I don't know.

Q. Now if, as you said, she grabbed at that gun, did you pull the gun at all out of your trousers?

A. No, sir.

Mr. Mulkey: At this point, Your Honor, I am going to ask that counsel be limited in his leading questions, it is all right for the rest of this examination but we are now at a point involved in this particular incident, and I am going to ask that he ask this man what occurred and that we have his testimony in the record and his only.

The Court: The objection is well placed. Proceed by way of questions and answers.

Mr. King: I will, Your Honor.

(Questioning witness) What occurred? Just tell the jury what went through your mind and what occurred at that moment when she grabbed for the gun.

A. Well, what occurred, when she grabbed the gun and had it in her hand it occurred to me to get the gun and in the struggle with it it went off three times or whatever [fol. 1501] times it went off, I don't know, and I—when the gun went off I seen this guy through the car over there and us scuffling over the gun and it excited me to which it would excite anybody during that scuffle over the gun and I don't remember just exactly whether her hand was still on the gun or not the last two shots or not. I don't know, I will put it that way, I don't know. But then I got the gun and I do know, I think I did, I snapped it at that other guy, him going down on the opposite driveway there.

* * * * * * *

[fol. 1502] Mr. King:

Q. Why did you go there that night?

A. I went there on the occasion I thought that she, that I would catch her with somebody else coming in after she wasn't in at that time of the night, at 1:00 o'clock.

Q. Were you going to shoot her?

A. No, sir. I was just going to scare them. I wouldn't have shot her at all, no intentions of shooting that woman.

Q. Now after you got in your car what did you do?

A. Well, I drove back home and I buried the gun for the simple reason I wanted, I thought if I could get a hold of an attorney that morning I was going to have him take the gun and have the fingerprints taken off the gun, and that was the reason I wouldn't tell them where the gun was.

Q. Now you did make several statements to the officers afterwards, didn't you?

A. Yes, sir.

Q. And you went through an examination for several hours, for a couple of days, didn't you?

A. Well, from Saturday, all day, no sleep Saturday night, no sleep Sunday, no sleep Sunday night, no sleep until about 4:00 o'clock. I presume I went through a pretty good examination.

Q. How many times did you ask for a lawyer would you say?

A. I would say I asked for a lawyer ten times.

Q. And you asked how many people?

A. Well, everyone that I talked to I still asked them for a lawyer.

Q. And what did you say about a lawyer and the facts of the case?

[fols. 1503-1504] A. I told them if I got an attorney I would tell the truth and nothing but the truth. I think Mr. Gillick will verify that too and Mr. Grinnell too.

Q. You had a conversation with Mr. Grinnell, did you not, in the jail over here?

A. Yes.

Q. In my absence?

A. Yes, I did.

Q. And did you tell him you were telling the truth when you talked to him?

A. Yes, sir.

Q. And what did he say?

A. Well, he said he believed me.

. . . . . .

[fol. 1505] (Questioning witness) Would you show the jury your foot?

A. Yes, I have.

Q. Now does that foot when you walk cause you to limp badly or not, when you walk fast?

A. Yes.

Q. And how about walking slowly?

A. Walking slowly you can tell it by me walking slowly if you pay any attention to me at all, you can tell it, but walking fast, if I wear a new pair of shoes it is better, if you take them over there (indicating on Clerk's desk) I limp worse with them than these right here.

* * * * * * *

[fol. 1506] Direct examination. (Resumed)

By Mr. King:

Q. Yesterday we touched briefly on your trip back from Gridley to your home in Palermo.

A. Yes, sir.

Q. Which way did you go home?

A. Well, I came across the bridge there at the Gridley camp there on the way toward—by Robinson's Corner.

Q. And then where did you go from Robinson's Corner toward Palermo?

A. I went by the Palermo Inn and down by the dog—[fol. 1507] no—by the Hut.

Q. I am talking about when you came home finally that evening after the shooting.

A. After the shooting?

Q. After the shooting. When you came from Robinson's Corner which way did you go to Palermo please?

A. I went across the road there, the highway there, and hit the Long Bar road over there and come out over there this side of Palermo.

Q. Is that Long Bar road a short cut?

A. Yes.

Q. You testified something about the holster and the gun. Will you tell the jury just what you did when you got home concerning the holster and the gun?

A. Well, the holster and the gun—the holster was at the house when I came back from Gridley. I buried the gun under a big rock out there.

Q. Now, at that point, did you put any loose dirt over it at all?

A. No, sir, I don't think I did. I just put a clod or a rock or whatever you want to call it over the gun.

Q. What did you do with the holster?

A. I stuck it in the garbage can out there.

Q. All right. Now, why did you not bury the gun deeper?

A. Well, what I wanted to do I wanted to get a lawyer and have him to take it down and have the gun fingerprinted.

Q. Why?

A. So that they could get her fingerprints off the gun that morning.

Q. You came across the Feather River, didn't you?

A. Yes, sir. I could have throwed it in there if I had [fol. 1508] been so minded to, but I didn't want to do it. I wanted them to take the fingerprints off of the gun, which I didn't get no chance to get a lawyer. I asked for a lawyer so I could do so but I wouldn't tell them where the gun was.

. . . . . .

Q. How were you dressed that night?

A. Well, I had on a pair of blue denim trousers, jeans.

Q. I wish to show you a pair of blue denim trousers.

. . . . . .

Q. I will now show you a pair of blue denim trousers which have been marked as People's Exhibit No. "32" and ask you if those appear to be the trousers that you wore that night?

A. Yes, sir.

. . . . . .

Q. Yes. I will show you a shirt that appears to be somewhat sun marked, a red dotted, light tan shirt, marked [fol. 1509] People's Exhibit No. "31", and ask if you have seen that shirt before?

A. Yes, sir.

Q. Does that look like the shirt that you were wearing that night?

A. It looks like the shirt I was wearing that night.

Q. I will show you a pair of shoes which is marked People's Exhibit "30", the left shoe being stuffed with some

sort of paper substance, and ask you to examine those and see whether or not are the shoes that you were wearing that night?

A. They was.

Q. What is that stuffing in the toe of the shoe?

A. Well, it is part cotton and part paper.

Q. What was the purpose for stuffing a shoe that way?

A. Well, it was on account of my toes off of my left foot.

Q. Do you usually stuff every shoe that way that you wear?

A. Yes, sir.

* * * * * * *

[fol. 1510] Mr. King:

Q. I will show you this gun. Is that the gun that you owned and that you had stuffed in your belt the night that we are talking about?

A. Yes, sir.

Q. Are you familiar with the gun?

A. Well, I have used the gun quite a number of times.

Q. Did you hear the snap just then (indicating gun)?

A. Yes, I heard the snap.

Q. What was that?

A. It was just a snap is all.

Q. The gun firing on an empty cartridge?

A. Yes.

Q. Or an empty cylinder?

A. Empty cylinder or whatever you want to call it.

Q. Now, this clip holds how many shells? Do you know?

A. I would say the clip holds nine shots eight or nine we will say.

* * * * * * *

[fol. 1511] Q. You know that it will hold eight or nine cartridges?

A. Yes.

* * * * * * *

Q. Do you know how many shells were in the clip or the gun the night that you went to Gridley?

A. No, sir.

Q. You have testified that when you first went to Gridley you left the gun in your lock box of your car?

A. Yes.

Q. When did you first take the gun out to go down to the house in Gridley?

A. Well, I taken the gun out the first time I went over there and stuck it in my belt. I walked down to the house and knocked on the front door and nobody answered the door.

Q. Yes.

A. Well, I turned around and comes back up the alley and back up to the car. The car was sitting up on the right up there. And I got in the car and drove back by the Pastime over in Gridley see if her car was there and it wasn't there. And I drove on back to Palermo Inn out here, dropped by there and she wasn't there. And I come on down by the Hut and she wasn't there. And I come by the Little Shamrock and she wasn't there. And then [fol. 1512] I came on up to the Dog House, by there, and she wasn't there. And when I went back by Robinson's Corner it was closed tight.

Q. All right.

A. And then I drove on back to Gridley then.

Q. As you were driving around where was the gun?

A. The gun was laying in the front seat of the car.

Q. Now, when you got back to Gridley you picked up the gun I take it?

A. Yes, sir.

Q. And put it back in your belt?

A. Yes, sir.

Q. And then went back down to the house, is that it?

A. Yes, sir.

Q. And you went about the way this witness Mrs. Thomas testified, is that right?

A. Yes, sir.

Q. Now, you testified briefly about walking about in that alley. How much walking did you do in the alley?

A. Well, I walked down——.

Q. I am talking about the second time that you came back.

A. Well ——.

Q. Do you recall?

A. Well, I walked around to the front of the house and pecked on the front door and I thought maybe she had had car trouble or something the reason she wasn't there.

Q. When you say pecked what do you mean?

A. Knocked on the door.

. . . . . .

[fol. 1513] Q. Then what did you do about the alley?

A. Well, I walked back to the little shed back there I had to go to the bathroom as you say.

Q. Well, when you went back to the shed why did you have to go to the bathroom right at that time?

A. Well, the reason I had to go to the bathroom I had had a hemorrhoid operation and you can not hold it, you have to go suddenly when it strikes you.

Q. In other words, you had quite an urge and you had to go right now?

A. Yes.

Q. Do you have any idea how long you might have stayed in the little house?

A. Well, I couldn't say definitely. Maybe five minutes I would say. It could have been more. I don't know.

Q. While you were in the little house were you waiting——. Put it this way: Were you trying to hide while you were in the little house?

A. No, sir.

Q. Definitely no?

A. No, sir.

Q. When you got through with your bowel movement what did you do?

A. Well, I walked back to the back of the house and I walked down the alleyway towards south.

Q. What were you looking for?

A. Well, I was just walking around killing a time, thought, well maybe she would come in pretty quick.

Q. Could you have seen her when you were walking [fols. 1514-1515] around? Would you have seen her or heard her come if she had come?

A. Yes. I could have seen her car lights as she come up that there street there whatever the name of the street is.

Q. As you were walking around waiting for her as you

have testified you could have heard or seen her drive in if she had driven in?

A. Yes

Q. All right. Now, going back to this gun just briefly since you have fired this gun where do the shells eject from the gun?

A. The right.

Q. Now I will show you the breech of the gun. It won't open unless you have the safety off I notice.

A. No, sir.

Q. In other words, the safety has to be like that (demonstrating)?

A. The safety has to be off.

Q. All right. Now I will show you the breech of the gun. When this gun is fired by pressing the trigger as I just did, snapped it, where does the shell throw out?

A. It throws it out to the right.

Q. Always to the right?

A. Yes.

Q. Is there any possibility that this gun can ever discharge a cartridge to the left?

A. Well, no, sir, not as best of my knowledge.

. . . . . .

[fols. 1516-1534] Q. Do you know how far it generally—this gun throws a cartridge out?

A. I would say anywheres from eight to ten feet.

Q. And it tosses them out to the right?

A. Yes, sir.

. . . . . .

[fol. 1535] Mr. King:

Q. Now, Mr. Atchley, calling your attention to this picture and in particular to the car port and to this side of the house.

A. Yes, sir.

Q. And then going to the back of the house where these little walnut trees are that you have testified about.

A. Yes.

[fol. 1536] Q. Could you see along the left side of the house outward towards the street?

A. Yes.

Q. And when you were standing back of the house waiting for your wife to come home you could see a car drive in from back—I mean standing behind the house you could see a car drive in in this position, could you not (indicating no photograph)?

A. Yes, I could see the car drive around and come into the driveway, where I was standing.

Q. Which way did the car come?

A. It come from that-a-way.

Q. We will have to get that.

A. Above Scharsch's house (it came in from the other way).

Q. Here is Scharsch's house, it came down this way and turned in here, did it? (indicating on photograph).

A. Yes.

Q. And from the time it turned into the garage where were you?

A. I was standing just to the walk-way, just beside the corner of the house.

. . . . . .

Mr. King:

Q. All right, I will ask you this question, when did the car, if you recall, when the car drove into the driveway [fol. 1537-1540] you have testified that you were in the back of the house?

A. Yes.

Q. Heretofore, now I would like to have you straighten it out for the jury.

A. When the car come by I was back there at the little walnut tree and I walked around to the corner of the house and she got out of the car and she come around the fence there and started into the, yes, she come around there.

. . . . . .

[fol. 1541] The Witness: When I left the little walnut tree back there she done passed the house and I came around to the corner of the house there on the little walk-way.

Mr. King:

Q. Where is that walkway relative to this picture?

A. The walkway comes right up the side of the house.

. . . . . .

[fol. 1542] Q. Now that wasn't what I was going into but I am asking you to try to remember what you did after the shooting ocurred, immediately after the shooting occured what did you do?

A. Well, I immediately——

Q. (Int.) Relative to this gate now, go ahead.

A. Well, after the shooting occurred I come out of the gate and went north.

Q. Up past Scharsch's house?

A. Yes.

Q. Were you running or walking or do you know?

A. I was walking, I could have trotted or something or other, I won't say, or I started out walking I do know I am pretty sure of that, that I did, a fast walk.

. . . . . .

Mr. King:

Q. Now you have testified you come to the corner of the house which is just outside this—showing the portion of the house, the front of the house?

A. Yes.

Q. Now where did you first get—where did you first see Kay as she came around the side of the house?

A. Well, she was coming through the gate up the walkway.

Q. How far up the walkway did she come?

A. Well, she come, when I met her, I met her there at that slab.

Q. Is this the slab you are talking about (indicating)?

A. Yes.

Q. And where were you at the time?

[fol. 1543] A. I was at the corner of the house at the time she came through the gateway.

Q. All right now, but when she got to this point where were you?

A. I was there directly right in front of her.

Q. Well now, what do you mean, "Directly in front of her," did you get off of the walkway at any time?

A. No, sir.

Q. Well, that walkway curves around the house, does it?

A. Yes.

Q. Now as you followed that walkway, where did you meet her?

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[fols. 1544-1546] A. Well, I met her just about here, right along in there (indicating on slide).

Q. You are indicating a point——

A. A point right there (indicating).

Q. The corner of the porch, aren't you?

A. Yes.

Q. Towards the corner of the porch?

A. Corner of this ~~porch~~ here, this little old platform here as you see.

Q. Then what happened?

A. Well, I reached up to hug her and when I did she moved me back and grabbed the gun when she moved me back.

Q. All right. Then what did you do?

A. Well, what I did, I tried to get the gun away from her, and in the struggle the gun went off. I don't know. I couldn't say whether two or three times or what it might have went off. And I seen through the car there was a man standing on the other side of the car.

• • • • • • •

[fol. 1547] Q. Let me ask you Mr. Atchley, when you saw——. You have testified you saw a man standing there by the car?

A. Yes, sir.

Q. Now tell me what he did?

A. Well, I would say while we was scrambling over the gun the gun went off and I don't know just exactly how many times the gun went off and the gentleman that was on the other side of the car he took off to the back of the car towards the street.

Q. Could you see him at that time?

A. I seen him during the—when we was struggling over the gun when the gun went off.

• • • • • • •

[fol. 1548] Mr. King:

Q. You saw him running away?

A. Yes, I seen him running away down the street after I came out of the gate.

Q. All right. Now, going back to the point, after you say—after the gun went off the first time, did you see the man go away from the car?

A. Yes. I seen the man go away from the car and also——. I don't know whether her hands were loose from the gun during the time that the man run off from the car, at the back of the car, but when I did get hold of the gun I did—the best of my remembering I think I did, one or the other, I snapped the gun at him.

Q. When you say snapped what do you mean?

A. I meant I pulled the trigger at him.

Q. Do you know whether the gun fired or not?

A. I don't know.

Q. How was that man dressed?

A. Well, he had a light shirt and—I wouldn't say whether it was dark pants or khaki pants or what. I didn't pay too much attention because I couldn't see his pants on the other side of the car. That was when I got out in the street [fol. 1549] and he was going down the street.

• • • • • • •

Cross-examination.

By Mr. Grinnell:

[fol. 1550] Q. Mr. Atchley, I went to ask you a few preliminary questions. As I understand it from your testimony you are at the present time 43 years old?

A. No, sir, I am 41 going on 42.

Q. You are going on 42?

A. Correct.

Q. Very well. And you came to California, at one time in your testimony, it seemed '45 or '46, then I heard another

date mentioned of 1943. Now, can we clear that up at this time as to just about when it was that you did come to California.

A. Oh, it was in '43.

Q. It was?

A. I am pretty sure.

Q. You are pretty sure of that?

A. Yes.

Q. So then you have been in California some 15 years, is that correct?

A. Yes, somewhere in that neighborhood.

Q. And this is now '58. So that it hasn't been 20 or 21 years as was referred to on your direct examination yesterday, but rather some 15 years.

A. I been in California about 15.

Q. During the time you have been in California you have worked generally at a number of jobs involving farm labor work, then you became connected with the automobile business, is that correct?

A. That is correct.

Q. Generally speaking that has been since the end of World War II?

A. Yes.

Q. I believe you testified that you worked in Imperial Valley before you came up to Oroville?

A. Correct.

Q. And that after you came to Oroville you sold cars for [fol. 1551] your brother Sam who had the car business out on the corner of the Palermo road and—what's the one that goes into the new plywood plant? Anyway, you know where I mean.

A. I know where you mean.

Q. So then you might say that you have been associated with cars and in that line of work for some ten years now?

A. Well, somewheres near eight or ten years I would say.

Q. And during that period of time you had day to day contact with prospective purchasers regarding the sale of cars?

A. Yes.

Q. That has been your business, both buying and selling cars?

A. Yes.

Q. And you have also during that time had to perhaps repossess some of these cars, have you not?

A. Yes.

Q. And you have perhaps at various times during this time had to employ legal counsel in order to do that?

A. I employed—I mean, Keith Lyde at one time.

Q. And also I believe that you have employed at least Mr. Goodwin and Mr. Clewe at one time also?

A. Yes.

Q. So that have you not prior to this occasion, prior to the 1st of August, you have employed then several different attorneys in this community at various times, have you not?

A. You mean in '58?

Q. Prior to August 2nd, the time that we are talking about, prior to that time you had employed several different attorneys in this community in connection with your business?

[fol. 1552] A. I did Mr. Clewe because you had to have a counsel representative to——.

. . . . . .

Q. Prior to the death of your wife on August 3rd, 1958, ——. You recall that event rather clearly, do you not?

A. I remember about the time it was, yes.

Q. Prior to that time you had had occasions then to employ at least three attorneys in the Oroville area to represent you in various business dealings, had you not, and their names which have been mentioned a moment ago?

A. I had employment of——.

Q. Just answer yes or no please. If you wish to explain it later I am sure that can be brought up. Do you understand the question?

A. I don't understand the question the way you want it.

Q. Did you employ Mr. Clewe at some time, or his office, to represent you?

A. John McDonald, if that's who you are referring to.

Q. Or his office. And he certainly is working in the firm of Clewe, Blade and McDonald, is he not?

A. Well, probably so.

[fol. 1553] Q. And also you have employed Mr. Lyde you said?

A. Previous.

Q. That is what we are talking about.

A. For repossessing.

Q. I don't care what it was for. I am just asking you if you did.

A. Yes.

Q. And you also employed Mr. Goodwin, Norris Goodwin?

A. Yes.

Q. So then we can say you knew at least three attorneys in the community from prior business experience prior to the date of your wife's death, is that correct?

A. Yes.

Q. Now, generally speaking, when did you go out of business? By that I mean, referring to the used car business.

A. Well, I couldn't say definitely. I closed up the car lot in the last part of '57.

Q. Would that be you turned your license in at that time, is that correct?

A. Correct.

Q. So that would be somewhere in December of '57?

A. Well, somewhere in that.

Q. That you ceased—turned in your license to sell cars at the Department of Motor Vehicles and went out of business? Is that correct?

A. Correct.

Q. The used car business. Now, why did you go out of the used car business?

A. Well, I couldn't go out and talk to the public on account of my wife.

Q. I see. Now, is it not true, Mr. Atchley, that during the [fols. 1554-1555] times that you were in business that you were relatively successful financially?

A. Yes.

Q. And may we say that you perhaps earned somewhere between eight and thirteen thousand dollars a year?

A. Well, I would say approximat ly.

Q. So that this was then by our standards a successful business?

A. Well, by my standard it would be, yes.

• • • • • • •

[fols. 1556-1559] Q. Did you marry Kay Atchley about the time that you went out of business?

A. I had turned my license in before we went East.

Q. So that you actually then ceased doing business when you went to Georgia to marry your wife? Yes or no?

A. We wasn't in business when we went to Georgia, no.

• • • • • • •

[fol. 1560] Mr. Grinnell:

Q. You have testified the reason you went out of business was because your wife forced you out of business?

A. Correct.

Q. And you do not wish to change that testimony at this time?

A. No, sir.

• • • • • • •

[fol. 1561] Q. Very well. In any event, we say, as we have said earlier, that your used car business was a profitable one as far as you were concerned?

A. It was profitable if you would run it right.

Q. And it even enabled you, had it not, to build these [fol. 1562] three houses which I have referred and purchase some lots of an estate and out of some property from Mr. Firestine?

A. Mr. George Firestine.

Q. Yes, Firestine. So that you had acquired this property as a result of your earnings in this business venture, is that correct? You hadn't inherited any money, had you?

A. Well, no.

Q. Of course, none of these women gave you any money, did they?

A. No.

Q. So that whatever money you had you earned yourself?

A. I have earned myself.

• • • • • • •

Q. Well, as you testified, you averaged between eight and thirteen thousand dollars a year?

A. Well, in '57 I run $19,000 through my books. So I won't say how much I made either way.

Q. In any event, whatever you acquired came from your business?

A. I would say yes.

Q. Very well. Now, during this time you made several trips over the country, did you not?

[fol. 1563-1568] A. Several trips over the country?

Q. Yes, out of the state?

A. I made one trip out of the country on account of taking my brother back East when he got killed.

Q. Right. And did you make any other trips?

A. I made one more trip the following—next Christmas after that.

Q. Then you made the trip in which you married Mrs. Atchley?

A. That was the trip I am talking about.

Q. So you only actually made then two trips back, is that correct?

A. Yes.

Q. Of course, you paid all the expenses and everything while you were gone, did you not?

A. Absolutely.

* * * * * * *

[fol. 1569] Q. Did Mr. Harvey make a check payable to you for part of the purchase price of that car?

A. Yes.

Q. He did? And was that check for $50?

A. Yes.

Q. Is that correct?

A. Correct.

Q. Did you testify at the trial that we have referred to before that the reason this $50 check was made payable to you was because Mrs. Atchley owed you that money for rent?

A. That's what she said.

Q. I am asking you what you testified to.

A. Yes, that's what I said.

Q. And you testified under oath?

A. Yes.
Q. In June of this year?
A. Yes.
Q. That you received $50 from a Mr. Harvey for rent that your wife owed you in June of this year?
A. Yes.
Q. Was that true?
A. That was true.

. . . . . .

[fol. 1570] Q. Is it true then, Mr. Atchley, that you received that check for rent?
A. That's true, is what I told down there, is what she told the make it out for.

. . . . . .

[fols. 1571-1572] Q. I am asking you if you did not testify under oath, raise up your right hand and swear to tell the truth, so help you God, that you received that check from Mr. Harvey as rent from Mrs. Atchley?
A. Absolutely. I absolutely just told you about three times that I received that check from Mr. Harvey in presence of my wife.
Q. That you received that as rent from Mrs. Atchley?
A. Well, that's the way we resumed it by Mr. Harvey there and that's the way I testified down on the stand because she did tell Mr. Harvey that.

. . . . . .

[fol. 1573] Q. You did testify in Court that you received that check as rent from Mrs. Atchley?
A. Yes.

. . . . . .

[fols. 1574-1575] The Court: Your answer is yes, your testimony was false?
The Witness: On the check, yes.

Mr. Grinnell:

Q. Your testimony in June of this year, June 10, in the Oroville Justice Court, was false?

A. On th[illegible] here particular part here (indicating check).

Q. And you were under oath when you testified? Answer yes or no?

A. Yes. I said yes.

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[fol. 1576] Cross-examination (continued)

By Mr. Grinnell:

Q. Mr. Atchley, you recall, do you not, arriving home following the shooting in Gridley?

A. Yes, sir.

Q. About what time did you arrive home?

A. I don't know, I wouldn't say.

Q. Well, would you say that it could have been somewhere in the neighborhood of 3 o'clock in the morning?

[fol. 1577] A. I wouldn't say because I don't know.

Q. Well, you have an estimate?

A. No, I don't.

Q. You can't even estimate?

A. I would say it was somewhere around 3:30 or 3 o'clock, 3:30, 3, somewhere in that neighborhood, somewhere, I wouldn't say.

Q. You remember hearing Mr. Travers' statement, do you remember that?

A. Yes, sir.

Mr. King: Which statement was that please?

Mr. Grinnell: Mr. Travers' statement.

Mr. King: The insurance man?

Mr. Grinnell: Yes. (Questioning witness) Do you remember stating in that statement that you got home around 3 o'clock in the morning?

A. Well, it was some time, a man couldn't drive from Gridley in 10 minutes, you know.

Q. What time would you fix the shooting at, Mr. Atchley?

A. Well, I wouldn't know exactly where, whether it was 3:20 or 3:25 or I wouldn't even say.

Q. Don't you mean 2:20 or 2:25?

A. Yes, I wouldn't say either way.

Q. In any event, as I understood you when you returned

home you returned by a different route than you had taken over there?

A. Yes.

Q. And I believe you mentioned the Long Bar Road?

A. Yes.

Q. Where is this Long Bar Road?

A. Well——

Q. (Int.) Do you mean the Power House Hill Road or do you remember the Long Bar Road?

A. I guess that is the Long Bar or Lone Tree Road.

[fol. 1578] Q. Lone Tree Road?

A. Yes.

Q. And that Lone Tree Road runs from somewhere in the vicinity of Power House Hill Road out towards Robinson's Corners, does it not?

A. Out in that general direction, I wouldn't say the way there because I don't know it.

Q. Well, anyway you didn't come back the main traveled route that you had gone over?

A. No, sir.

Q. And I believe you testified you came back this way because it was a short cut?

A. Yes.

Q. However, you had not gone over the shortcut, you had just taken the shortcut coming back?

A. Yes.

Q. As soon as you got home you did certain things that you have testified to, is that correct?

A. Correct.

Q. You have already testified to those. Now I want to call to your attention about the hour of 4 o'clock on Sunday morning because the officers arrived as near as we can determine from the testimony about an hour after you got home, is that correct?

A. I wouldn't say either way, whether it was an hour after I got home or what.

Q. Didn't you say in your statement here to Mr. Travers, that the officers arrived at 4 o'clock?

A. About 4 o'clock was what they said it was.

Q. And they found you in bed, did they not?

A. They found me in the house and laying on the bed.

Q. Were you asleep?

A. No.

[fol. 1579] Q. You had not gone to sleep?

A. No.

Q. However you were undressed and in bed, is that correct?

A. I had off my trousers and shirt.

Q. And they asked you to come down to the sheriff's office, did they not?

A. Yes.

Q. They informed you, did they not, that your wife had been shot in her front yard?

A. No, sir.

Q. They did not inform you of that?

A. No, sir.

Q. Did you know that at that time?

A. Why sure I knew it at that time.

Q. Well, you knew at that time, did you not, why they were questioning you, did you not?

A. No, sir, because they didn't tell me.

Q. They didn't, did they ask you if you had been to Gridley?

A. Yes, they did.

Q. And what did you tell them?

A. I believe I told them no at that time.

Q. You told them, "No" you hadn't been to Gridley, is that correct?

A. I believe that is what I told them.

Q. Did they ask you whether or not you knew of any person or persons who might have been responsible for the death of your wife?

A. Well, I said in one occasion that we was in, in the bar down here at Roy's Feather River Inn——

Q. (Int.) I asked you whether they asked you that morn-whether or no you knew.

[fol. 1580] A. That is what I am referring to, Mr. Mizell.

Q. Then you told them that at that time?

A. When they asked me I did? I don't know, it was during that time or not, I don't know.

Q. And you told them, did you not that a man by the name of Braxton Jones had made a threat against your wife?

A. That was what we had been told by Mrs. Waters.

Q. You knew when you told the officers that, you knew that Braxton Jones had not killed your wife?

A. I knew it.

Q. At that time you told them that you did not own a gun, a 22 automatic pistol?

A. Told——

Q. (Int.) At that time when they questioned you that morning.

A. Told them I didn't have one?

Q. Didn't own or have a 22 automatic gun.

A. I did.

Q. That was not true, was it?

A. That was not true.

Q. Further more you told them that you had sold this gun about a month prior thereto to your wife, did you not?

A. I don't remember whether I did or didn't that morning.

Q. Did you tell them that you had observed the transaction outside of the second hand store across from the Safeway in which you- wife sold the gun to a man who you identified as either Brown or Green?

A. I don't remember at that time what I might have told them.

Q. You have no recollection at this time of telling the officers about selling this gun to your wife?

A. I don't remember at the time, no.

[fol. 1581] Mr. King: Mr. Grinnell, and if the Court please, are you referring to the first conversation or the second conversation?

Mr. Grinnell: I didn't say first or second, I said when he talked to the officers that morning. (Questioning witness) And you talked to the officers on several occasions, did you not—let's put it this way, Mr. Atchley, when you first talked to the officers you told them that you knew nothing about the killing of your wife, did you not?

A. I don't know whether I did—I don't know whether I did or not, maybe I did, I don't remember.

Q. Well, you certainly knew why they were questioning you, didn't you?

A. No, sir, I did not.

Q. Had you ever been picked up at 4 o'clock in the morning before and brought in for questioning?

A. No, sir.

Q. That was the first time?

A. That was the first time.

Q. And I assume that you were a little concerned to find out why you had been brought in at 4 o'clock in the morning?

A. Yes, I was a little concerned.

Q. Yet you can't recall at this time any questions asked you about whether or not you knew anything about the death of your wife?

A. I don't remember about it at that time, no.

Q. Let me ask you if this is not true, Mr. Atchley, that when you were first brought in your attitude was one of shock over the grievous thing that had happened to your [fol. 1582] wife and that you readily volunte-red to cooperate with the officers in any way that you could to find the person or persons who might have done this terrible thing, is that not true?

A. Maybe I did tell the officers there, I won't say.

Q. And along those lines you told the officers about selling the gun a month or so before to your wife and then her in turn reselling it to a man by the name of Brown or Green, because you were trying to help the officers at that time find out where this gun might be, were you not?

A. Which I give my wife authority to sell the gun one time.

Q. I understand that and you told the officers, did you not that your wife had sold this gun for $25, that she had given you $25 for it and sold it for $30.

A. May be I did, I don't remember too much about it.

Q. Well, did you not tell the officers at that time that the reason you remember that specifically was because you were short in one your payments to the bank and that you used that money to make the payment to the bank, that $20 or $30 that you got from your wife for the sale of the gun?

A. Well, I don't remember so much about it but maybe I did.

Q. Did you sell a gun to your wife for $25 or $30?

A. No, sir.

Q. Did you use any money from your wife to make a payment at the bank?

A. I used $85 when it came back from Georgia, not from Georgia, from going back to see her father in Arkansas.

[fol. 1583] Q. So that any statement that you might have given to the officers at that time that you received $25 from your wife on or about the 5th of July, was not true, was it?

A. Not true.

Q. Now——

A. (Int.) Is best I can remember, I will say it that way.

Q. At that time you further related to the officers that you had been an eye witness to a transaction in which your wife had sold this gun, did you not?

A. Well, I might have said it but I don't remember.

Q. And that you described this man that you sold the gun to, this many by the name of Brown as "weighing about 140 or 145 pounds, about 45 years of age with his face not so broad as mine, I guess, about as narrow as mine, having a grey hat on and his hair looking grey".

A. I might have, I won't say I didn't, I might have told the officer that.

Q. Did your wife ever sell a gun to an individual who resembled that person?

A. Not as I recall.

Q. Then your description of that person to the officer that morning was not true, was it?

A. Not true.

Q. Now in addition at that time you were asked if you had ever sold anything in addition to this gun to your wife, do you recall telling the officer that in addition you had also sold a television set and some beds to your wife?

A. I bought her a television back in the summer when she lived down on Pearl Street or, it was either on Pearl [fol. 1584] Street or on the colored section back up there and she lived in an apartment house where colored people lived on one side and she lived on the other side. I did buy a television there.

Q. My question was not whether or not you bought a television set, Mr. Atchley, whether or not you told the officers that morning that you had sold these two items that I mentioned, to your wife?

A. Not as I remember it, no.

Q. Recalling your attention again to that conversation on the early morning hours following the shooting of your wife and before you had admitted any implication in it, do you remember this question, "Have you sold her anything else, just way though, I mean for cash, anything other than the gun that you can remember. Ans. Television".

A. I don't remember.

Q. You don't recall that?

A. I don't recall it but I might have said it.

Q. "Sold her the television. Ans. Yes. Ques. When was that, about the same time? Ans. No, that was about when I was going with her when she lived up—" and then there is an interruption. Ques. "Were you married to her then? Ans. No. Ques. Since you married her you have never sold her anything but the gun? Ans. No, I don't think so".

Mr. King: Just a moment now, counsel, may I interrupt please, if the Court please, I wish to object——

Mr. Grinnell: (Int.) I am asking him if he recalls making these statements that morning after the shooting and before Mr. Atchley had made any admission whatever [fol. 1585] about being in Gridley.

Mr. King: My objection goes to this point, he started asking about a television and then he continues to read a statement or something or other of that sort.

Mr. Grinnell: I am trying to refresh his memory for your benefit, Mr. King.

Mr. King: My objection only goes to his continuing to read the statement after the television is mentioned, I am perfectly willing he should answer whether or not he told the officers that.

The Court: Mr. Grinnell, proceed by way of asking the witness questions.

Mr. Grinnell: Thank you. (Questioning witness) You do not recall that then at this time?

A. I might have said it by I don't remember.

Q. Is it true you sold her a television set?

A. It is true I bought her one and give it to her.

Q. You did not sell it to her then?

A. No.

Q. So if you told some one you sold it to her that was not true then?

A. That was not true because I give it to her.

Q. Also, did you say at that time that you sold her a couple of bedsteads?

A. I might have said it, but I don't remember.

Q. Did you sell her some bedsteads?

A. No, the bedsteads is still over there in the house where [fol. 1586] she was living right now.

Q. I am asking you if you sold her some bedsteads?

A. I said I don't remember if I did, I might have said that.

Q. And the question was, "For how much" and your answer was "$10".

A. I might have said that, I won't say.

Q. Did you sell her some bedsteads?

A. I answered you, counsel, twice.

Q. Did you or didn't you?

A. I said I don't remember if I said it, may be I did.

Q. Well, did you sell her some bedsteads, I am asking you now again whether you did or not?

A. No.

Q. Then if you said you sold her some bedsteads for $10 that was not true?

A. That was not true.

Q. Now you have testified that you are the father [illegible] of these children, I believe you have identified that child as Brenda Gale?

A. Brenda Gay.

Q. And that this child was about four years old now?

A. Yes.

. . . . . .

[fol. 1587] Q. May I ask you if you have ever supported that child?

A. Well, I bought here everything that a man could buy a child I think.

Q. I see, now let me ask you this question, this child was one of the children that she was receiving welfare for, was she not?

A. Well, I guess now, I don't know, I couldn't say there.

Q. Well now, what do you mean, you don't know?

A. How would I know.

Q. Didn't you go and check?

A. I didn't go and check with Mrs. Anderson about it, no.

Q. When you went out to see Mrs. Anderson, you didn't tell Mrs. Anderson that, "I am the father of one of these children" did you?

A. No, sir, I don't remember if I did, I might have did, I don't know now.

Q. And don't you know, Mr. Atchley, that she was receiving a sum of money each month for that child from welfare.

A. Well, which I know I was paying some money.

Q. I asked you if she was not receiving welfare for that child?

A. No, I didn't know that she was.

Q. You didn't know that? Did you ever go to the welfare department and tell them you were the father of that child?

[fols. 1588-1589] A. Not as I remember, no.

. . . . . .

[fol. 1590] Q. But you have never told anybody in the welfare department?

A. Not as I recall.

Q. And you knew your wife was getting welfare, aid to needy children?

A. Well, Mr. Grinnell, I will tell you there, I tried to get my wife off of that welfare, but would she come off of it, no.

Q. I am going into that in just a moment.

A. That is what I want you to do.

Q. But you didn't tell the welfare department she was getting welfare for your child, did you?

A. No, sir, I don't think I did.

. . . . . .

Q. That is right, when you went out to see Mrs. Anderson, you went out and asked Mrs. Anderson why she was making your wife move away from your place in Palermo, isn't that true?

A. That is correct.

Q. You didn't go out there then, did you, to tell Mrs. [fols. 1591-1597] Anderson you were married to her or that you was the father of this baby?

A. I don't remember whether I told Mrs. Anderson I was the father of the baby or not.

. . . . . .

[fols. 1598-1602] Q. Maybe we better clear up something first, your wife moved to Gridley about Wednesday, about Tuesday, July 29th, did she not?

A. No, sir.

Q. When she went and rented the house?

A. We went over there on Monday or Tuesday.

Q. Monday or Tuesday?

A. I will say.

Q. And she moved over there I believe, you took the first load over on Wednesday?

A. Wednesday night I believe.

Q. I see, she did not live with you after moving over on Tuesday or Wednesday, she did not live with you as man and wife thereafter?

A. Tuesday, or Wednesday, yes.

Q. Which one of those days?

A. She slept with me Wednesday night, Tuesday night.

Q. And where?

A. Out here in the big House.

Q. When did she move to Gridley?

A. I told you she moved over to Gridley late Thursday evening I believe, if I am not wrong.

. . . . . .

[fol. 1603] Q. No, no. We have been over there. Now let's not get back into that again. I am talking about when you said you came in to see someone in the welfare office.

A. Well, as I was getting to telling you, Mrs. Anderson said she called the welfare worker, the case worker and told here.

Q. Then you didn't go in?

A. I did, yes.

Q. You did go in?

A. Yes.

Q. All right.

A. Mrs. Anderson questioned me to go in.

Q. And you did go in? And who did you go and see?

A. I don't know.

Q. Somebody in the welfare office?

A. Somebody in the welfare office.

Q. And you told them at that time that you were married to Mrs. Atchley?

A. Correct.

Q. And my question now is, why?

A. They asked me could I support her. That's why.

Q. Could you support her?

A. Yes.

Q. How much money have you given her during that past week?

A. Well, for the past month——.

Q. I asked you about the past week, Mr. Atchley. How much money had you given her during the past week?

A. Well, Mr. Grinnell, I can't answer that question.

Q. You heard Mrs. White testify that she didn't have [fols. 1604-1608] any money at all on that Saturday to go to the dance and that she had to borrow some money from Mrs. White to even buy food, and that Mrs. White went with her to buy food for the children. You heard that, did you not?

A. Well, I am going to ask you another question.

Q. Did you hear that? Just answer my question.

A. No.

Q. You didn't hear that?

A. No, I didn't hear that.

Q. What money did you give your wife for her support and the support of her children after she moved to Gridley?

A. Well, she took all the groceries that was in the house out so I supposed she had plenty of groceries.

Q. The question was, what money did you give her?

A. She didn't ask for any money.

Q. And you didn't give her any?

A. She didn't ask for any and I didn't give her any.

Q. You went into the welfare office on Friday to tell them that your wife was getting this money, that she wasn't

entitled to get for herself and your baby, and that you were well able to support her?

A. I was well able to support her, yes.

. . . . . .

[fol. 1609] Q. Mr. Atchley, once again I am calling your attention to what you told the officers before you made any admissions about going to Gridley whatsoever. I am going to ask you if you do not recall telling the officers at that time that you had made a threat to kill your wife?

A. Not as I remember, no.

Q. You don't recall that?

A. No.

Q. In other words, the question was asked of you:

"Q. Isn't it a fact that you told me that you stated to her, 'I ought to kill you, you son of a bitch,' in those exact words?

A. That's the exact words I said."

A. I don't remember if I did.

Q. Well, whether you remember it or not do you recall at this time whether those words are true?

A. Well, I would say that I never have said it as long as I can remember.

Q. Then you deny making such a statement?

A. I might have made that statement down here. I don't know now whether I did or didn't.

Q. If you did make that statement was it true or false?

A. It was false.

Q. It was false? And furthermore may I ask you—— I asked you when the last time you threatened her and you said, "Oh, about a couple of weeks ago, I guess," And I said, "What was the occasion? Do you recall?" And you [fol. 1610] said, "Well, it was over Barbara had told me that she had gone out with Norma Snow and Bill and some other fellow." And that fellow's name you weren't able to recall or didn't know him perhaps, but you said that you had told her that you had heard she had gone out with Norma Snow, Bill and this other fellow and that she became outraged and was going to go right down to Norma Snow and whip her. And the answer, "Yes, that's true."

A. But she did get up one night about midnight. That's

been quite awhile ago. I would say that was before we went back to Arkansas, and I want to get up and go down there and whip her. That come up in some manner there. But I don't know what manner it was in at this time.

Q. I am asking you at this time, Mr. Atchley, if you did not say when you were attempting to cooperate with the officers in any way that you could to clear this matter up that you told them that two weeks before your wife's death Barbara had told you these things and that you had made this threat at this time when Barbara told you these things: "I ought to kill you, you son of a bitch."

A. I don't remember it.

Q. Two weeks before your wife was killed——.

Mr. King: Just a moment, if the Court please. Let the witness answer.

The Witness: I am going to answer this question this way: Because I know it wasn't two weeks before this here killing took place because I know it had to have been four or five months back if it was anything said then, but not [fol. 1611] this late, no, sir.

Mr. Grinnell:

Q. I am asking you then——.

A. Because I don't remember ever saying that.

Q. I am asking you then at this time whether or not you recall making that statement to the officers that night?

A. I said I don't.

Q. You don't recall making it?

A. I don't recall making it.

Q. Could you have made it?

A. Well, I might have. I won't say now on that.

Q. If you did make it was it true or false?

A. It was false on the killing part.

* * * * * * *

[fol. 1612] Mr. Grinnell:

Q. By the way, before I get into some other topics that will take a little time to develop, there are several minor things I would like to clear up. Is it true, Mr. Atchley, that you have been married three times instead of two times?

A. Yes.

Q. Then any inference on direct examination that you only have been married twice was incorrect?

A. She had been married three times.

. . . . . .

Mr. Grinnell: Well, I think it has been answered, as I said it was a minor point but one in which you had seen fit to go into on direct and he has now said that it was three times and that is all that I wish to go into. (Questioning witness) Now once again we are talking about conversations had with the officers prior to the time that they brought in and confronted you with the holster and the gun which had been found in your back yard, so that we get it in point of time, you understand, you talked to them several times before they found the gun and holster buried in your back yard.

A. I might have said it but I was highly upset at the time, I don't recall what I did say to them, I will say that.

Q. You might have said that?

A. I might have said what you asked me there then about the thing.

[fol. 1613] Q. Well, I haven't asked you anything yet, I just want to fix this in your mind in point of time because when you were first brought in and questioned, and that is the period of time we have been covering so far, the time in which you deny any knowledge or implication in the killing or the shooting of your wife.

A. Well, I don't deny none of what I have said but——

Q. (Int.) All I am asking you is I want to fix that in point of time, you recall that you talked to the officers on several occasions before they brought in the gun and holster and showed you that they had recovered them.

A. I think so, I don't remember.

Q. And I am referring to conversations you have with the officers prior to the time that they brought in the gun and holster and showed you that, that is what I am referring to so that you will know what time I am talking about. Now in those early conversations you were asked about whether or not you had any shells for a gun, in particular a 22, were you not?

A. Well, I don't know whether I was or wasn't, if I was I probably said it, if I had some shells I said it.

Q. You did?

A. Yes.

Q. In other words then if I were to ask you at this time whether or not you denied buying any shells, any 22 shells, what would your recollection at this time be?

A. Well, I wouldn't say that, I might have said it, I had bought some or I might have said I hadn't bought some, [fol. 1614] but I don't remember because the high shock of stages I was in then I wouldn't realize what I was saying.

Q. Oh, you didn't realize what you were saying, is that correct, you didn't realize what you were saying?

A. That is what I said.

Q. And what had caused this great shock to your nervous system?

A. Well, I would say my wife, that is what I would say that caused it.

Q. You mean the fact you just shot your wife?

A. Yes, I didn't shoot her, it was accidently scuffling over the gun.

Q. The officers showed you a box of shells recovered from a locker, foot locker, did they not? And I am holding the box up at this time.

A. I don't remember whether they did or not, I won't say, Mr. Mizell.

Q. Didn't you tell the officers you have never purchased any bullets, any 22 bullets prior to the time they showed you this box?

A. I might have, I don't know.

Q. Now when they showed you this box you told them you had purchased this box for the rifle you had sold to Mr. DeCamp.

A. I might have told them that.

Q. Don't you recall that?

A. No, I don't recall it but I might have told them, I will say it that a way.

Q. Did you load the gun which killed your wife from this box of shells?

A. I don't know whether it was that box or not, I couldn't swear to that, if it is the box that come out of my foot locker I did.

[fols. 1615-1616] Q. So that if you told the officers that you did not buy any shells, that was not true, if you told the officers you didn't buy any shells that was not true?

A. I will put it this way, I don't remember about the things that I had said to the officers after my wife was killed.

. . . . . .

[fol. 1617] Mr. Grinnell:

Q. Let's put it this way, you loaded this gun, did you not?

A. Well, as I say, about a month before we went to Arkansas, now I will put it that way, Mr. Mizell.

Q. Well, sometime—by the way, you loaded it as far as you know, filled the clip?

A. Filled the clip and there was one in the barrel.

Q. One in the barrel so if the clip held nine that would make 10 shots, and if you only filled the clip it would make nine shots?

A. Yes.

Q. And some time after you filled the clip it was fired three times at some cats or some snakes now?

A. I will correct you there, I shot twice at some cats out in the back yard.

[fols. 1618-1622] Q. All right.

A. And my wife got the gun out of the dresser drawer in there and went out in the back and shot one night.

Q. And what did she shot at?

A. I don't know.

Q. So the gun had been fired three times?

A. Yes.

Q. So far as you know?

A. So far as I know.

Q. That would be the time she shot out the back door, and you don't know what happened, and the time you shot at the cats?

A. Correct.

. . . . . .

Q. At any rate you know of your own knowledge that the gun was fired three times?

A. Of my own knowledge.

Q. And that left, as you said 10 in the gun, that left 7, is that right?

A. Correct.

. . . . . .

[fol. 1623] Q. Now I believe Mr. Lyde talked to you in the early morning hours of Monday morning, did he not?

A. He might have.

Q. And that was in the District Attorney's office?

A. He might have.

Q. And at that time he asked you a number of questions, did he not?

A. He might have done that, I wouldn't say.

Q. And at the time he asked you particularly about whether or not you had been to Gridley that night, do you recall that?

A. I don't recall it, probably I did if he asked me.

Q. And furthermore did he ask you whether or not you had gone into this little shed to the rear of the Atchley house?

[fol. 1624] A. I didn't—I had been up about 48 hours, Mr. Manzell, and I was in the highest shock, how would a man know.

Q. Well, did you not at that time tell him that you had not gone into this little shed?

A. I might have told him that.

Q. Didn't he tell you that they had found your shorts outside the bedroom window, the bathroom window, where you had thrown them and did you not at that time tell him that anything in that regard had happened right at your place in Palermo?

A. I don't remember, might have.

Q. In other words if you told him that you had not had this call of nature in Gridley, but rather at your home in Palermo and thrown them out the window because you lacked any toilet paper in the house, was that true or untrue?

A. That might have been true, Mr. Mizell, I don't know, I don't remember, but I could have said it, yes.

Q. And if you said it was it true or untrue?

A. It was true if I said it I guess.

Q. It was true, you did this at your home in Palermo?
A. I don't remember but if I said it I guess it is.
Q. Did you have it in the shed or at home?
A. Well, I went in the shed over there, I did that.
Q. But if you told Mr. Lyde you had not gone in the shed but rather this had happened in your house at home then that was not true, was it?
A. I don't know, I don't remember.
Q. If you said it it was not true, was it?
[fol. 1625] A. I don't remember.
Q. I am not asking you if you remember something, I am asking you if you said it, was it true or untrue?
A. I said I don't remember.

Mr. Grinnell: May I have a direction from the Court?
The Court: Yes, Mr. Atchley, don't you understand the question, if you said something, was it true or not true. Would you repeat your question, Mr. Grinnell.
Mr. Grinnell: Yes. (Questioning witness) If you told Mr. Lyde that morning, and of course I am referring to a point in time before the gun and holster had been recovered, if you told Mr. Lyde that morning that you had not done this in Gridley but rather in your home in Palermo and just opened the window and tossed them out the window, was that statement true or untrue to Mr. Lyde?

A. I had went over there in Gridley in the little shed there.
Q. So if you told Mr. Lyde you had not done it in Gridley but rather at home, that statement was untrue, was it not?
A. Untrue.
Q. Untrue, is that correct?
A. Correct.
Q. Now still talking about the same time, Mr. Atchley, you recall questions asked to you in this general tenor, what the relationship between you and your wife was.
A. I don't remember what I told him that morning.
Q. Well, do you remember telling the officers at that time that you felt that you couldn't live with this woman and you [fol. 1626] also felt that you couldn't live without her?
A. I don't remember if I did.
Q. If you told the officers that, was it true or untrue?

A. Well, I don't know whether I told the officers that or not, I won't say one way or the other.

Q. Did you tell Mr. Lyde, our District Attorney, at that time that you felt that the situation between you and your wife at that time was one in which you thought you couldn't live with her or without her.

A. I don't know whether I told Mr. Lyde that or whether I told the officers that or who I told, but I don't remember now, is that clear?

Q. If you told the officers that, was that true or untrue? Or Mr Lyde?

A. Well, if I told Mr. Lyde it was true.

Q. It was true, finally; Mr. Atchley, did you not tell Mr. Lyde on the morning that somewhere around 12 or 12:30 that you had taken Clint Rarlette and this other fellow home, whose name you could not recall and still couldn't recall at the time of the trial.

A. I guess I did.

Q. And that you returned to your home about 12:30 and went to bed, did you not tell Mr. Lyde that at that time?

A. I don't remember, I might have told Mr. Lyde that.

Q. And that you did not get out of bed again that night until the officers arrived?

A. I might have told Mr. Lyde that, I don't remember.

Q. Was that statement true or untrue?

[fol. 1627] A. Well, it if I said it I guess at my stage then that I didn't know what I was saying one way or the other.

Q. Was the statement true or untrue that you went to bed at 12:30 that night and didn't get up until the officers arrived?

A. I went to bed after 3 o'clock, I don't know what time or whatever time it was after I got back over there.

Q. The statement to Mr. Lyde you went to bed at 12:30 and didn't get up thereafter is untrue then, is it not?

A. Untrue.

Q. Now this conversation in the District Attorney's office with Mr. Lyde took place somewhere about the hour of 2 or 3 o'clock on Monday morning, did it not?

A. Monday morning, I don't remember too much about it, as I say I didn't remember too much about Monday morning nor Sunday morning nor nothing else.

Q. Now I assume that Friday night you went to bed in

the normal course of things, you weren't up all night Friday night were you?

A. Oh, I stayed up watching television until about 12.

Q. And then you went to bed?

A. Went to bed.

Q. So you got a normal night's sleep on Friday night, didn't you?

A. Well, I was up about 6 o'clock the next morning.

Q. But normal for you?

A. Well, no, I wouldn't say normal.

Q. Well, what was not normal about your getting up at that hour then?

[fol. 1628] A. Well, I usually never did get up before 8 o'clock.

Q. I see, so you get up a couple of hours earlier then?

A. That is correct.

Q. But you did get to bed somewhere around midnight?

A. Somewhere around midnight.

Q. And then the next day you pursued your normal activities, you went to various places that you testified in the evening, saw the different people and took these boys home somewhere around 12:30 that night, is that correct?

A. Well, I would say somewhere around that time.

Q. And then of course you went on to Gridley although we didn't know that at that time.

A. No.

Q. So that you did, the only sleep that you got Saturday night would be the hour after you returned home and before the officers arrived?

A. I didn't sleep any.

Q. You didn't sleep any?

A. No, sir.

Q. And then you were brought in and questioned and we have gone over that and then you were allowed to rest and go to sleep, were you not?

A. If you call it rest and sleep to put you down there in a concrete place with a little old thin mattress down there and just a toilet stuck in there, no place to wash yourself or anything, if you call that a good place to go to sleep, I guess so.

Q. And then after you were questioned by Mr. Lytle in

the morning you went back and went to sleep again, did you not?

A. No, I did not.

[fol. 1629] Q. Well, then, you didn't complain about sleeping through breakfast?

A. The breakfast they brought it, brought something back there and I told them I didn't want it, I didn't feel like I needed it or didn't want it.

Q. You are quite certain you did not complain to the officers because they hadn't woke you up for breakfast?

A. Well, I never was asleep and the trustees come back by there and talked to me such as Clyde Brown and brung coffee back there, I don't know.

[fol. 1630] Q. I am just asking you at this time if you did not complain to the sheriff?

A. Yes, I complained to the sheriff.

Q. That you had not been woke up?

A. I had not slept any and I complained when they brought me and kept me up two nights right on straight, two days.

Q. After 3:00 o'clock in the morning when you were returned back you were given a place to sleep?

A. The pit.

Q. You were given a place to sleep?

A. A pit.

Q. And then the next day you complained because they allowed you to sleep through breakfast? Did you or did you not?

A. No, sir, I didn't complain to the officer I don't think. I don't remember if I did.

Q. I will pass on that for the moment. I can't find it. In any event, you were not questioned on Monday until somewhere around 10:00 o'clock, is that correct?

A. I don't remember.

Q. Breakfast is usually what? Somewhere around 7:00 o'clock in the morning?

A. 6:30.

Q. 6:30? But you do not recall at this time complaining to the sheriff that you had been allowed to sleep through breakfast?

A. I don't remember even complaining to the sheriff at all.

Q. I see. And the next morning you recall, do you not, being brought back in and questioned, and before one word was said to you this gun and holster were placed on the table before you? Do you recall that?

A. I don't remember——

[fol. 1631] Mr. King: Just a moment. Before you continue your answer, might I object, Your Honor? I would like to know——. The People should have some foundation so that I might have the privilege of cross examining whoever the officers might be. For that reason I feel this question does go its competency and relevancy and I move the answer be stricken.

The Court: You could go into the people present and the time and location, Mr. Grinnell.

Mr. Grinnell:

Q. I am talking about the time when the gun and holster was shown to you. Do you recall that time?

A. Seems to me I remember something about it but I don't remember it clearly.

Q. Well, now, Mr. Atchley, had you told anyone prior—at least before this gun and holster was shown to you, had you told anyone that you had even been to Gridley the night that your wife was killed?

A. I don't remember.

Q. Isn't it true, Mr. Atchley, that you had not told anyone?

A. I don't remember, Mr. Grinnell.

Q. Had you told anyone?

A. Not as I can remember.

Q. Had you told anyone, Mr. Atchley, where the gun and holster were hidden?

A. I don't remember, to tell you the truth, I don't.

Q. Then you did not tell Mr. Anderson, as Mr. King stated in his opening statement—you did not tell Mr. Anderson where you had hidden the gun and holster, did you?

A. I don't remember at that time.

[fol. 1632] Q. However, when you saw the gun and holster on the table did you not then admit that you had buried this gun in your back yard?

A. I suppose I did, Mr. Grinnell.

Q. At that time did you admit or deny placing the holster in the barrel?

A. At that time? No.

Q. You did not? And that you had put the holster in the barrel?

A. I might have further back than what it was then, but I don't remember. But if I did it was through a mistake.

Q. As a matter of fact, I think that you actually told the officers that a little blond headed girl had put it in the trash barrel.

A. Well, I might have. I don't know.

Q. That statement was not true, was it?

A. No.

Q. Now, at that time, Mr. Atchley, you told the officers that you had gone to Gridley on two occasions that Saturday night? I am talking about that Saturday night after she showed you the guns.

A. Yes.

Q. You told them you had gone on two occasions?

A. I went over there two occasions.

Q. However, you told them on neither one of these occasions had you taken a gun to Gridley?

A. Yes. My gun was in the car then.

Q. Wait a minute. I am talking about at the time that they showed you this gun.

A. Well, I might have—I might have—I don't remem-[fol. 1633] ber it if I told them that. I will say that much.

Q. If you told them that you had not taken this gun to Gridley that was not true, was it?

A. That was not true.

Q. Did you tell them that you were waiting at the corner of the house, that your wife got out of the car, came through the gate, that she had the gun in her right hand as she came through the gate?

A. I don't remember anything about that. I might have.

Q. Did you not tell the officers once again——

A. I said I might have.

Q. I am asking you if you aren't certain that you told them that time that she brought the gun home and that she had it in her right hand as she came through the gate.

A. I might have. I don't know.

Q. If you told the officers that at that time that was not true?

A. That was untrue, yes.

Q. Because you had the gun?

A. I had the gun in my belt.

Q. Now at that time you told the officers after some questioning that you had put the holster in the barrel prior to going to Gridley. Do you recall that?

A. No, I don't remember that. But I put the holster in the barrel. I do know that.

Q. But didn't you tell the officers first when you first admitted putting it in the barrel that you had put the gun, the holster in the barrel prior to going to Gridley?

[fol. 1634] A. I don't remember.

. . . . . .

[fol. 1635] Q. Now, as I asked you a moment ago, you can't recal- whether or not you made the statement to the officers that you put that holster in the barrel before yo went to Gridley or afterwards, is that correct?

A. I don't know. I might have told them that. I don't——. I won't say.

Q. If you told them that you did put it in before you went to Gridley was that true or untrue?

A. I put it in after I come back from Gridley I am sure.

Q. So if you told them you put it in the barrel before went to Gridley was that true or untrue?

A. Untrue.

Q. Now, you have testified that you took the gun with you on both trips to Gridley?

A. Correct.

Q. You recall that?

A. Yes, sir.

Q. Mr. Atchley, could you have been in Gridley and your car parked where you say you parked it at 1:30 that morning?

A. That question again?

Q. You recall at this time where you say you parked your [fols. 1636-1637] car up the street?

A. Yes.

Q. About a block or a block and a half away from your wife's residence?

A. Oh, about half a block, something like that. Just beyond the road going up and down through there.

. . . . . .

[fol. 1638] Q. Which would put you then back in Gridley somewhere around 2:15?

A. 2:15, somewheres along in there.

Q. And you told Mr. Travers I believe on your statement that you had been there some 20 or 25 minutes when your wife arrived at 2:25?

A. Well, I don't remember telling Mr. Travers that I was there at that time, but I heard it over the tape recorder that I was. But I couldn't have been because the fire whistle had done gone off before I had ever arrived at Gridley.

Q. Mr. Atchley, isn't it true that when you went by your wife's house about 12:30 and then observed that she was not home that you were somewhat over upset over there?

A. No.

Q. You were not upset over it?

A. No. I thought maybe she had car trouble or something and I drove back. It was about 1:15, counsel, to tell you—when I was over to Gridley, just about in that neighborhood of the time.

Q. The first time or the second time?

A. The first time.

Q. The first time.

A. You was estimating it 12:30, but I didn't leave Oroville the first time until 12:30, counsel.

Q. The statement of Mr. Travers in the record;

"Q. What time did you go to Gridley?

A. Oh, somewhere around 2:00 o'clock.

[fol. 1639] "Q. How long did you wait for her?

A. Oh, about 25 minutes."

Q. Is that correct?

A. Well, I couldn't have waited for her 25 minutes, counsel, because——.

Q. Is that correct? Is that true that you said it at that time?

A. At that time, yes.

Q. Now, do you wish to change it?

A. No, I don't wish to change it.

Q. Then you will stand on it then, is that it?

A. I know it was after the fire whistle went off because I wasn't over there, counsel, and——.

Q. Now, could it have been that you were over there the first time around 12:30?

A. No, sir.

. . . . . .

Q. However, whether it was 12:30 or later you did go by to check and see if your wife was home?

A. It was——. I got out—pulled by the house and back up to the alley and pulled around the corner there and parked and walked back down to the house and knocked on the front door.

Q. And the reason, once again, that you were checking on your wife was because you thought that she was out with someone else?

A. Well, that was my intentions.

Q. And when you found your wife was not home—my [fol. 1640] question a moment ago was, "That upset you, did it not?"?

A. No, sir.

Q. Then why did you return to Oroville?

A. I returned to Oroville to see where she was at.

Q. You were going to find her, catch her with this other man, weren't you?

A. Well, I been told and her daughter had told me that she had been out with other men.

Q. That was your intention that night, was to catch her with another man?

A. That was my intentions, for me not going over there at 8:00 o'clock naturally.

. . . . . .

Q. I am calling your attention——. Counsel, you may follow me at page 47 of his record.

Mr. King: Thank you. Just a moment, Counsel. Which line please?

Mr. Grinnell: Line 10. The question by Mr. Travers:

"Q. There is one point I should put in there too, Jack.

What did you have the gun—what did you have the gun for in the first place?

"A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there, and so I went back and got it and put it in my belt."

A. It was in the car, counsel.

[fol. 1641] Q. Then this statement on the tape is true or untrue?

A. It is true, but the gun was in the car, counsel.

Q. (Reading:)

"Q. There is one point I should put in there too, Jack. What did you have the gun for in the first place?

"A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there. And so I went back and got it and put it in my belt."

A. That was in the glove compartment of the car.

Q. Isn't it true, Mr. Atchley, that you went over there, found your wife gone, went back to Oroville, got the gun, put it in the incinerator or trash barrel just as you said?

A. No, sir.

Q. Went back over there with the gun with the avowed intention of waiting for your wife to come home?

A. No, sir. I had the gun all the time, as I have told you all the way through. The gun had not been out of the car in a week before that.

Q. Then this statement which this jury heard, which we all heard with our own ears and your voice, is true or untrue?

A. It is true excepting the gun was in the glove compartment of the car. I didn't go back home to get no gun, counsel.

Q. Is the statement, "I didn't have it when I first went over there and so I went back and got it and put it in my belt," is that true?

A. Did I go to the house and get it, counsel? I said [fol. 1642] no, it was in the glove compartment of the car.

Q. Then why would you say, "I didn't have it when I first went over there"?

A. It was in the glove compartment of the car. I didn't carry it down there with me the first time I went down to the house, counsel.

Q. It was in the car?

A. It was in the car.

Q. You just had not carried it from the car to the house?

A. That is correct, counsel.

Q. You were or were not upset because you did or did not find your wife home when you went by to check on her?

A. No, sir. Counsel, I had been to her home many a time at 2:30 in the morning and 2:00 o'clock in the morning and I had my gun with me.

Q. Did you take your gun with you that evening because you were afraid of her?

A. The gun was in the glove compartment of my car that evening, yes, counsel.

Q. Did you take the gun to Gridley because you were afraid of your wife?

A. Well, I had been afraid of my wife at times, yes, but as far as me taking my gun over there to kill her I did not, counsel.

* * * * * * *

[fol. 1643] Q. All right. I am going to ask you first about your statement to Mr. Travers.

Once again, Counsel, I am referring to line 48 of the transcript of Mr. Travers'——.

Mr. King: What page please?

[fol. 1644] Mr. Grinnell: Page 48.

Mr. King: What line?

Mr. Grinnell: Line 4.

(Reading:)

"Q. And you had put the gun in your belt. Did you make an attempt to pull the gun or anything?

"A. No, sir. When I see nobody but her I didn't make no effort whatever."

A. Well, I didn't see nobody but her at that that time, counsel.

Q. Then it is your——.

A. It is my——.

Q. It is your statement at this time that when you made this statement you meant that you saw nobody but her when you were wrestling over the gun?

A. When we was wrestling over the gun the gun went off, counsel, I seen somebody through the glasses of the car standing on the other side of the car.

Q. In any event I will find it later. You did not. In any event, for the time being, in all fairness, I am laying the basis for impeachment, Mr. Atchley. You can not recall telling the officers at any time that she was alone when she came home?

A. I don't remember anything about it, counsel. At that time the only time I remembered it is when we was scuffling over the gun and the gun went off and I seen the gentleman through the glass of the car is the only thing that I can swear to right now at the present time.

. . . . . .

[fols. 1645-1649] Q. Now, if you told them that she had not come home with someone that was true or untrue?

A. Well, it would have been untrue if I told them she had not come home with somebody.

. . . . . .

Q. And she was alone at least until you started shooting?

A. When we were scuffling over the gun I would say, counsel, and it went off, and it drawed my attention when we was wrestling over the gun I seen the man through the glass of the car over there.

. . . . . .

[fols. 1650-1651] Q. All right. You saw her when you met her in the front of the house. Which hand did she have the keys in?

A. In her right hand.

Q. She had the keys in her right hand, isn't that true?

A. That's right, counsel.

. . . . . .

[fol. 1652] Mr. Grinnell:

Q. It is my understanding that the reason that you buried the gun in the back yard was because you wanted to preserve this evidence, and in particular her fingerprints so that you could turn that over to your attorney?

A. What I wanted to do, counsel, was to get a lawyer the next morning where he could go out there and get the gun and reserve it and have the fingerprints taken off of it, but which all that handled the gun where nobody could get any fingerprints off of it.

Q. Do you know that to be a fact?

A. I don't know it, but I resume it.

Q. In any event, you made no effort whatsoever after you got home to do anything but hide the gun?

A. That's right.

Q. You didn't go to any police or law enforcement agency to explain to them that you had just had an accident and you wanted them to examine this evidence and verify your story?

A. If I wanted to get rid of the gun I could have throwed it in the river as I crossed over.

Q. I didn't ask you that. Of course, you could have done anything.

A. Yes, I could.

Q. But you didn't go to any law enforcement agency to have them check it and verify the fact that prints may or may not be on it?

[fol. 1653] A. No, I didn't go to no law enforcement.

Q. Why did you not do that?

A. Well, why? I was waiting until that morning and I was going to get a lawyer and give the gun——.

Q. Why were you going to wait and get a lawyer? Why did you feel you needed a lawyer?

A. Well, if I brought it in and the fingerprints might have been taken off of it and I might have not have noticed anything about it and if I got a lawyer and had the fingerprints then I would have had her fingerprints also.

Q. Well, did she handle the gun?

A. Yes, sir.

Q. Where did she handle the gun?

A. She had it by the butt of the gun when it come out of my belt.

. . . . . .

Q. Of course, when you were with this thought in mind I am sure that you handled the gun in such a way not to destroy any fingerprints of hers that might have been on it.

A. I just pushed it down in the hole there and laid a clod over it.

Q. And when you carried it back to your car and back to Oroville or Palermo, you carried it in such a way that the prints would have been preserved, did you not?

A. I think so, counsel.

Q. In other words, the reason and the sole reason that [fols. 1654-1658] you buried that gun in your back yard was because you wanted to take it to an attorney and have him have it examine?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. If I were to tell you, Mr. Atchley, that that gun was examined for fingerprints and no fingerprints were found on it, not even yours because they had been wiped off, what would you say?

A. They had not been none of them wiped off, counsel, unless you wiped them off.

Q. You didn't wipe any prints off?

A. No, sir, I absolutely didn't wipe none of them off.

Q. Can you give me any reason why your prints then did not show on the gun when it was examined?

A. No, sir, I can't, unless you wiped them off. They should have been on there.

* * * * * * *

[fol. 1659] Cross-examination. (continued)

By Mr. Grinnell:

Q. Now I believe at our last meeting, Mr. Atchley, on Wednesday we discussed in general many things that occurred just before, immediately preceding the shooting of your wife at 384 Nevada Street in the City ow Gridley on the early morning hours of August 3rd, 1958, did we not?

A. Yes, sir.

Q. And I do not wish to repeat all of those again, however, I would like to go into several things that we discussed briefly. For example I would like to ask you at this time whether or not you are certain that you took the gun with you on both occasions when you went to Gridley that night?

A. Yes, sir.

Q. You are certain that you took it with you on both occasions?

A. Yes, sir.

Q. And are you likewise certain that you took it with you on both occasions when you left your car to go to the house?

A. I believe the gun was in the glove department of the car the first time that I went over there. The second time [fols. 1660-1663] I put it in my belt and went down to the house.

* * * * * * *

[fol. 1664] Mr. Grinnell: Page 47, commencing at Line 10, "There is one point I should put in there too, Jack——"

Mr. King: Will you explain, if the Court please, to the defendant that this is Mr. Travers' tape recording that we have here.

Mr. Grinnell: Yes, and the answers that are given here are the answers they heard on the tape are Mr. Atchley's answers. (Questioning witness) And this is Mr. Travers, "There is one point I should put in there too, Jack. What did you have the gun for in the first place". Now this is your voice, "Well, I didn't have it, I went over there, see, I didn't have it when I first went over there and so I went back and got it and put it in my belt." Now my question to you a moment ago was, if it was not true that you did [fol. 1665] not go back to Palermo, to your home and get the gun and take it back to Gridley on your second occasion, why did you say in your statement to Mr. Travers, "I did not have the gun when I first went over there".

A. The gun was in the glove department all the time and the second time, Mr. Travers took from me that, I do not remember even going upstairs where they said I went to have this last statement made.

Q. Is there any mistake or any doubt in your mind about the voice being your voice?

A. No.

Q. And the choice of words being your choice of words?

A. No.

Q. Then I am asking you why you said, "I did not have the gun when I first went over there".

Mr. King: Just a moment now, that is not the complete statement if the Court please, and I do insist and object to counsel asking part of a statement without asking the whole statement.

The Court: All right, the objection is sustained, if you want to present it again, Mr. Grinnell, you should use the precise words of the transcript.

Mr. Grinnell:

Q. Have in mind now when I am repeating this question, I am asking you why you said, "I didn't have the gun when I first went over there". You keep that in mind when I am reading this to you.

Mr. King: I object to the form of the question, if the Court please, on the ground that that will be a compound [fol. 1666] question and tends to and will confuse the witness on this very important point.

The Court: The objection is overruled, counsel is merely pointing out that he is going to ask the witness to explain the particular language and direct his attention to it. Now put your question, Mr. Grinnell.

Mr. Grinnell:

Q. Question, Line 10, by Mr. Travers, "There is one point I should put in there to. Jack, what did you have the gun for in the first place?" And your voice, Ans. "Well, I didn't have it, I went over there, see, I didn't have it when I first went over there, and so I went back and got it and put it in my belt." Now do you want me to repeat my question?

A. Repeat the first part of it.

Q. My question is this, why did you say, "I did not have the gun when I first went over there", if you had it in the glove compartment?

A. Well, which it was in the glove department all that day, that night, and the next time I went over there I figured if she brought somebody home with her that I would scare him and that was it. I did not aim to kill my wife so whatever.

Q. My question, Mr. Atchley, is this, why did you say, if you didn't have the gun with you, e. you did, as you now claim you did, why did you say, "I did not have the gun with me when I first went over there"?

A. Well, I don't remember that much back to where I said I didn't have the gun in the car. He didn't ask me, Mr. Travers didn't.

[fol. 1667] Q. He didn't ask you?

A. No, sir, is that a fair statement.

Q. He didn't ask you why you took the gun over there?

A. No, sir, not on the first occasion that you are talking about there, why, the gun wasn't, I didn't have the gun with me.

Q. Now, Question, Line 10, "There is one point I should put in there too, Jack. What did you have the gun for in the first place" and your answer, "Well, I didn't have it. I went over there, see, I didn't have it when I first went over there and so I went back and got it and put it in my belt."

A. Well, Mr. Grinnell——

Q. (Int.) And once again, my question——

Mr. King: Just a moment, let him answer that question, if the Court please, he started to answer.

Mr. Grinnell: I hadn't finished the question.

The Court: Counsel has not completed his question, he referred to a section of the transcript.

Mr. Grinnell:

Q. Now my question is this, Mr. Atchley, as you have now testified, the gun was in the glove compartment of your car all the time, why did you say, "I did not have the gun when I first went over there"?

A. Because Mr. Travers didn't ask me.

Q. Line 10, "There is one point——"

Mr. King: Is that on Page 46 or 47?

Mr. Grinnell: We should know it by heart now.

Mr. King: I am just wondering which one you are refer-[fol. 1668] ring to, I am entitled to know.

Mr. Grinnell: "There is one point——"

Mr. King: What Page please, counsel?

Mr. Grinnell: Page 47, Line 10, "There is one point I

should put in there too, Jack. What did you have the gun for in the first place".

Mr. King: Just a moment, now, I have a right to object here. If the Court please, Your Honor perhaps does not have the transcript before him as I see now. The punctuation means something here, the question is, "There is one point—there is one point I should put in there too." And then he says, "Jack, why did you have the gun——" "What did you have the gun for in the first place" and he answered, "Well, I didn't have it. I went over there, see, I didn't have it when I first went over there and so I went back" and then there was dots indicating in the trend of thought, in other words there is a good long pause there and then, "And then I went back and got it and put it in my belt". Now, if the Court please, I do feel that the transcript should be read the way it appears on the record. We want the record in the case and the record speaks for itself of course, but it is not here before this Jury at this time.

Mr. Grinnell: I submit, Your Honor, that the jury has heard the tape recording and they will hear it again. I don't wish to play the tape recording at this time but——

The Court: (Int.) The objection is overruled, you may [fol. 1669] proceed.

Mr. Grinnell:

Q. I believe you just told me, Mr. Atchley, for the second of third time, Mr. Travers did not ask you why you took the gun over there in the first place, and I believe that each time I have repeated the question and also Mr. King a moment ago, that the exact words were to the effect, "Why did you take the gun over there in the first place" do you recall that now?

A. Well, I will give that answer—the reason I taken it out of the car the second time I was over there, was on account I had been told that she had been out with other fellows and which I thought if come in with somebody I would scare him, I didn't have no intention whatsoever of having any thoughts in my mind of even shooting my wife.

Mr. Grinnell: Your Honor, I will move the answer be stricken as non-responsive. (Questioning witness) And ask

you once again, Mr. Atchley, why did you say that you had not taken the gun over there in the first place, if you had the gun in the car all the time as you now claim?

A. Well, that was what I told you, counsel, the gun was in the gun all the time, in the glove department.

Q. All right now, the question is, "Why did you say you did not take the gun over there in the first place then"?

A. I didn't take it from the car down to the house the first time, no.

Q. In other words then, when you say in your sentence, "Well, I didn't have it, I went over there, you see——"

[fol. 1670] Mr. King: (Int.) What page is this? I wish counsel would give me, when he starts reading the transcript, give me a chance to look at it.

Mr. Grinnell: Page 47, Your Honor.

Mr. King: All right, what line?

Mr. Grinnell: Line 12 reading the answer.

Mr. King: What line?

Mr. Grinnell: Line 12.

Mr. King: Thank you.

Mr. Grinnell: I will stand over here, you seem to have more difficulty hearing me than Mr. Atchley.

Mr. King: No, I am not complaining about hearing you, I am complaining about the way you are proceeding here. I am entitled to listen and to know——

Mr. Grinnell: (Int.)

Q. Why did you say, Mr. Atchley, you did not have the gun when you first went over there if it was in the glove department of the car at all times?

A. Well, Mr. Travers didn't ask me did I have it in my car, I will put that a way, answer that question that a way.

Q. Didn't Mr. Travers ask you what you had the gun for in the first place?

A. Not in the first examination of the proceedings he went through with me on the first time, no.

Q. Listen once again to the question, Page 47, Line 10, and there is nothing in between, this is the question and then your answer, "There is one point I should put in there [fols. 1671-1675] too. Jack, what did you have the gun for in the first place?

Ans. Well, I didn't have it, I went over there, see, I didn't have it when I first went over there and so I went back and got it and put it in my belt".

A. The answer for that, Mr. Mizell, I will give that question as fair as I can answer the question, that Mr. Traverse did not ask me did I have it in the car.

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[fol. 1676] Q. Could it be, Mr. Atchley, that because of the realization of what you had just done, what had just happened, the fact you were not particularly familiar with the area, having only been there on several prior occasions, could it be, Mr. Atchley, as you rushed out the gate, or backed out the gate that you inadvertently turned south on Nevada Street for a few steps, a short distance, maybe down past the driveway or somewhere in that area in the [fol. 1677] proximity of Mrs. Edsinger's house and then realizing that you were proceeding in the wrong direction turned around and walked back in the direction of your car?

A. No, sir.

Q. You weren't in that great a shock?

A. I wasn't, I didn't go that a way, I went north.

Q. However, you have testified that this incident shocked you greatly?

A. Yes.

Q. And as I understand from your examination Wednesday you made no attempt to call an attorney or the police either before leaving Gridley or upon arriving home after the shooting?

A. I was aiming to call an attorney that morning and give him the gun and let him fingerprint the gun just exactly like I said, and didn't get no opportunity to do it.

Q. You realized when you left the front yard that your wife was dead?

A. I looked down at her and I figured she was dead, yes.

Q. You knew at that time that it was serious, did you not?

A. Yes.

Q. But you made no attempt or effort at that time to contact anyone about that, did you?

A. As I said I asked for counsel about eight or ten times when I got down here where I could tell the truth and nothing but the truth and your'ns wouldn't give me one.

Q. Did you ask for an attorney at any time prior to the time you were confronted with the gun and holster [fol. 1678] which had been found buried in your back yard.

A. I asked for an attorney before you even found the gun.

Q. Are you certain of that?

A. Yes.

Q. And once again, the reason you asked for an attorney was in order to preserve this evidence?

A. Preserve the evidence, the fingerprints off the gun to where they could check them.

Q. It didn't have anything to do with the fact that you might have killed your wife then, that you wanted to see an attorney.

A. I wanted to see an attorney for the simple reason the fingerprints, her fingerprints were on the gun the same as mine.

Q. Now I believe I touched briefly about whether or not she came home alone and I asked you about some statements that you made to Mr. Travers. Calling your attention again, counsel, to Page 48 at Line 5, starting at Line 4, question, "And you had the gun in your belt, did you make an attempt to pull the gun or anything. Ans. No, sir, when I seen nobody but her I didn't make no effort whatever."

Mr. King: If the Court please, I object, that the preceding question should be read so that it won't be out of context, I think in order to fix the time and the place.

Mr. Grinnell: I am quite certain this jury knows what time and place we are talking about.

Mr. King: At what stage of the proceedings, counsel?

The Court: Let me see.

Mr. King: Well, I feel this should be gone into very carefully, so that there won't be any misunderstanding. [fol. 1679] The Court: All right, Mr. King, you made your point now let me look at it.

Mr. Grinnell: The preceding question is something to the effect, Your Honor——

The Court: (Int.) I have it before me.
[fol. 1680] The Court: The objection is overruled. You may present your question.

Mr. Grinnell:

Q. At line 4:

"Q. Did you make an attempt to pull the gun or anything?

"A. No, sir. When I seen nobdy but her I didn't make no effort whatever."

A. That is correct.

Q. That is correct? And once again on page 49 at line 26:

"Q. So she got out of her car and she walked up the walk and she was by herself?

"A. Yes."

A. Yes.

Q. Now at this time I want to ask you—and once again I am referring to Mr. Travers' statement at page 48, line 8,—and this is following this very question—in fact, I will read the whole thing, commencing at line 4, once again:

"Q. And you had the gun in your belt. Did you make an attempt to pull the gun or anything?

"A. No. When I seen nobody but her I didn't make no effort whatever.

"Q. She seen the gun?

"A. She seen the gun.

"Q. Then what happened?

"A. She grabbed, lunged right on it. That's all I could do."

Mr. King: Would you finish please? If the Court please, that isn't the complete statement.

Mr. Grinnell: "I didn't know anything else to do."

Q. Do you recall making that statement, that there was nobody else but her, that she saw the gun, lunged at it, [fol. 1681] and you struggled over it?

A. That is when I reached to start to hug the woman and she got the gun.

Q. And I am asking you——

A. I said yes.

Q. You do recall then that you said she saw the gun and lunged at it?

A. She got the gun, yes.

Q. Once again on page 45 of Mr. Travers' statement, commencing at line 32, commencing actually at line 29:

"Q. Where was the gun actually at?
"A. Right in my belt.
"Q. Right in your belt?
"Yes. Then she made——.
"Q. Go ahead
"A. She made a lunge for it and got it, see."

Do you recall that testimony or stating that to Mr. Travers, that she made a lunge for the gun when she saw it?

A. Yes, I suppose I did.

Q. And once again at page 50 of Mr. Travers' statement——.

Mr. King: What line please, counsel?

Mr. Grinnell: Commencing about line 12:

Q. "Q. I see. And she could see it? In other words, the shirt wasn't over it? You had your shirt tucked in?
"A. Yes.
"Q. So she saw the gun?
"A. Uh-huh.
"Q. Then what happened?
"A. Well, she grabbed for it and she got the handle of it and pulled her out, and when she did that I reached and grabbed with both hands, see."

Now, do you recall telling those things to Mr. Travers?

A. Well, the best of my memory I did, yes.

[fol. 1682] Q. Page 39, cross examination—or rather, direct examination by Mr. King.

The Court: What volume?

Mr. Grinnell: Volume 8, Your Honor, page 39, commencing line 8:

Q. "Q. Then what happened?"

Just start two lines before that:

"Q. Towards the corner of the porch?

"A. Corner of this porch here, this little old platform here as you see.

"Q. Then what happened?

"A. Well, I reached up to hug her and when I did she shoved me back and grabbed the gun when she moved me back."

Now, do you recall telling the Court that you reached up to hug your wife and then she grabbed the gun?

A. I did.

Q. So which is true now? When you walked up to your wife with the gun sticking in your belt she saw it and made a lunge for it? Or when you reached up to embrace your wife and she grabbed the gun?

A. Best I can remember when I reached up to hug her she reached and got the gun.

Q. Then it isn't true then, as you stated earlier, that as you walked around and faced your wife she saw the gun sticking out and made a lunge for it?

A. She probably——. She could have seen the gun when I walked around with the gun in my belt because it was just like daylight and she could have seen it. Wasn't nothing to keep her from it.

Q. In other words, you see nothing inconsistent, Mr. [fols. 1683-1689] Atchley, between those two statements, your prior statement that she saw the gun and lunged for it and your statement in Court here that you went to embrace or hug your wife and she took the gun out your gun belt —out of the belt of your pants?

A. Correct.

• • • • • • • • •

[fol. 1690] Mr. Grinnell:

Q. All right. I am referring to Monday morning following your wife's death, approximately sometime between 10:00 and 12:00 o'clock in the interrogation room, which is upstairs in the Butte County sheriff's office, and present were Mr. Lazier, Mr. Gillick, Mr. Gibbs of the Gridley police department and yourself. Do you recall at that time when the gun and holster had just been brought in and shown to you?

A. I don't remember too much about it at that time.

Q. Well, you remember the first time you saw this gun and holster after the killing, do you not?

A. I remember seeing the gun down there but I don't remember too much about it.

Q. And you recall that these people were present when the——.

. . . . . .

[fol. 1691] A. No. I don't say that they was present because I don't remember too much about it.

Q. And that it was somewhere between 10:00 and 12:00 that day?

A. I don't know.

Q. Well, those are the people that were present and that is the——.

Mr. King: Just a moment now, if the Court please. Counsel is testifying. I object on the grounds that that is not proper cross examination.

Mr. Mulkey: That is in the record, Your Honor.

Mr. King: And ask that Counsel's comments be stricken.

Mr. Mulkey: It is in the record.

The Court: Just a moment. This question is not by way of evidence itself. The question refers to a conversation or an interview at a particular occasion and Mr. Grinnell has now identified that time and place. Now, if you have a question in connection with it, Mr. Grinnell, you may put your question.

Mr. Grinnell: Very well. Thank you, Your Honor.

Q. The question commencing about line 6:

"Q. That I don't know. What I am asking you, when you got over to Robinson's Corner and you didn't find her there——.

"A. 1:00 o'clock.

"Q. She was there until 1:00?

"A. No, she wasn't there.

"Q. You were there until 1:00 o'clock?

"A. No. I dropped in there about 1:00 o'clock.

"Q. About 1:00 o'clock you arrived there? That would [fol. 1692] have been Sunday morning 1:00 a.m.?

"A. No.

"Q. She had left with some other man or gone off with

a party somebody told you about? You assumed that she had?

"A. Her car wasn't there.

"Q. That's what you though anyway? This probably worried you, isn't that right?

"A. Right.

"Q. Probably made you terribly unhappy that she might be out with some other man?

"A. Well, it did on account of her daughter telling me of her going out with this other party.

"Q. Her daughter told you she had previously been out with another man, is that correct?

"A. Yes.

"Q. You didn't have any reason not to believe that, is that right?

"A. That's right.

"Q. Is that why from Robinson's Corner you went over —when you went over to her house probably mad from this report and the fact that you didn't find her?

"A. The car was gone.

"Q. This probably made you——. As a matter of fact it might have outraged you, all steamed up about it? You know what I mean?

"A. No. She had the gun.

"Q. I am not talking about the gun. I am talking about when you left Robinson's Corner and went over to her place what was your thinking at that time? That she was probably out with another man?

"A. Well, I thought if she was she would come in.

"Q. You thought maybe she——. Where was she carrying the gun?

"A. In her hand.

[fol. 1693] "Q. Where did she take the gun out of?

"A. She got it out of the car when she come out of the car.

"Q. She got out of the car, parked the car in the carport there.

"A. When she come around there, the gate of the fence, seen the gun in her hand, and I stayed back against the corner of the house."

Now, do you recall——

A. I don't remember too much about that.

Q. If you did state that earlier was that true or untrue?

A. Well, as I say, I might have said anything to get them to quit questioning me and let me go to bed and sleep. I might have said anything. I don't remember.

Q. If you said it was it true or untrue?

A. Untrue.

Q. It was untrue. Of course, although counsel didn't object, the question was, you were all steamed up over your wife being out with another man and also that she actually had come home with a gun. Both of those statements you are now claiming if you said them were untrue?

A. Yes.

Q. Now, I believe that just before the recess I was—I asked you about this conversation that apparently took place as you two met on the sidewalk that early Sunday morning of August 3rd when you inquired, "Honey, where you been so late?" And she replied, "None of your god-damn business." Now, I can't find the exact spot. I'll find it later. Do you recall telling anyone immediately after this event that you couldn't recall anything that was said [fols. 1694-1697] by either one of you as you met that early morning?

A. I don't remember.

Q. You don't recall whether you said that or not?

A. No, sir.

[fol. 1698] Q. Calling your attention again to the transcript, page 77, the transcript that I previously referred to in which you had been shown the gun and holster and Mr. Gillick and Mr. Lazier and Mr. Gibbs and yourself were present upstairs in the interrogation room, on line 7——

Mr. King: Just a moment. May I read it (looking at transcript). How far do you intend to go?

Mr. Grinnell: Down through line 10.

Mr. King: All right.

Mr. Grinnell: (Reading:)

"Q. How long had you been in bed and asleep?

"A. Just as quick as I drove from Gridley.

"Q. How long did you come from Gridley?

"A. Oh, about 25 or 30 minutes."

Q. So you thought at that time it would have taken somewhere between 25 and 30 minutes to make the trip, is that correct?

A. One way, yes.

Q. Each way?

A. Yes.

[fols. 1699-1723] Mr. King: If the Court please——

Mr. Grinnell:

Q. And again at page 80 of that transcript, starting with line 17——

Mr. King: Just a moment, Counsel. I must have a moment to look into this before I can frame an objection if one is necessary or I feel it is necessary. Starting on what line?

Mr. Grinnell: Line 17.

The Court: How far down?

Mr. Grinnell: Through line 20.

Mr. King: All right.

Mr. Grinnell: (Reading:)

Q. "Q. But she was down on the ground when you fired the last two shots?

"A. I don't think so.

"Q. Of course, she never said anything more to you than 'Oh, no'?

"A. I don't think so."

A. I don't remember, counsel.

Q. Tell me, Mr. Atchley, was your recollection better on Monday, August 4th, 1958, about the incidents that occurred on Saturday evening relative to this killing of your wife, or is your recollection better at this time as to what was said?

A. Better at this time.

Q. It is better at this time?

A. Correct.

. . . . . .

[fol. 1724]. Q. All right, will you take the firearm now and put it where you had it as you waited for your wife to return home and would you stand up.

A. (Witness does as requested)

Q. And you were standing at the corner of the house I b-lieve you have testified, as she got out of her car?

A. No, sir.

Q. You did not see her get out of her car?

A. No, sir, I said that I walked from the back of the house, [fol. 1725] from the little walnut tree at the back around to the corner of the house as she came through the gate.

Q. Well, we will go into the later, in any event you saw her as she came in the gate?

A. Yes.

Q. And you were at that time at the corner of the house, is that correct?

A. It was right about at the corner of the house on the walk way, there.

Q. On the walk way, now as your wife came through the gate did she see you?

A. Well, she had no reason not to see me.

Q. Did she speak to you?

A. She didn't speak to me, no, sir.

Q. She came on towards the front of the house, is that correct?

A. She came on up the walk way and I met her there on the walk way next to the porch there.

Q. You met her at the corner of the porch, as you testified, the concrete slab?

A. The little slab there right along about there.

Q. As you told Mr. Travers at Page 45, Line 3——

Mr. King: (Int.) Just a moment, counsel, please.

Mr. Grinnell:

Q. "You were standing at the corner of the house" and your answer, "Yes, where she goes into the door and she come up to the door and I just stepped around the corner and right into her face". Is that right?

A. The first testimony I give Mr. Traverse, I gave it to him, about the man on the other side of the car, the first [fol. 1726] testimony I gave Mr. Travers in the lawyer's room there and Mr. Travers did not ask me anything about it in the second questioning there.

. . . . . .

Mr. Grinnell: Thank you, Your Honor. (Questioning witness) And then this took place, and these pictures and diagrams we have already seen, as you were about to step up, as she was about to step up on the front porch, that raised porch.

A. Well, I wouldn't say that, I would say she was coming up to the little walkway there, the little concrete slab there. [fols. 1727-1741] Q. What do you mean when you say the corner of the porch?

A. Well, the little slab part there.

Q. So that you meant then at the corner of the porch?

A. Just about right in front of the little slab there.

Q. And at that time she was coming towards the house?

A. Yes.

Q. She was facing the house?

A. Yes.

Q. And you were facing the street?

A. Yes.

Q. Is that correct?

A. Yes.

Q. All right, you were facing the street and I am facing the house, we meet just like this (demonstrating).

A. Yes.

Q. How close do we come together?

A. Well, we was about like this and I started to reach my arms like that (witness and Mr. Grinnell Demonstrating standing in front of jury).

Q. Just like that?

A. Yes.

Q. And what did she do?

A. She grabbed the gun.

Q. And with which hand?

A. With her left hand I believe.

Q. All right, come on back here (Mr. Grinnell and witness move further from witness chair), she grabbed the gun with her left hand?

A. Yes.

. . . . . .

[fol. 1742] Mr. Grinnell: Thank you, Your Honor. I would like to refer for just a second to Mr. Atchley's

statement to Mr. Travers once again before I put the parties back in their respective positions. At page 45, line 3:

"Q. You were standing at the corner of the house?

"A. Yes, where she goes into the door and she comes up to the door and I just steps around the corner and right into her face.

"Q. Tell me something. She lunged. What did she do when she walked up the walk? What exactly did she do?

"A. She walked up the walk and got up the door and took her keys out and—I don't believe she had her keys already out—and started to reach for the door when I stepped around the corner there and when I stepped around the corner she seen the gun handle sticking out and she reached and grabbed it."

Q. Now, do you recall making that statement, Mr. Atchley?

A. I might have made it to Mr. Travers.

Q. Might have made it? All right. Now, we are standing here—we were standing here a few moments when [fols. 1743-1747] there was an objection made and I believe that you both had your hands on the gun (indicating Mr. Mulkey and the defendant). Would you get the purse back the way you had it, Mr. Mulkey, and the keys in your hand because you are the deceased.

Is this the way she came up the walk? Do you know at this time, Mr. Atchley, whether or not the first shot that was fired was the one into her left breast or into her head?

A. That I couldn't answer.

Q. Well, which would you say at this time? Was it—was the gun higher or lower when it went off the first time than the second time?

A. Well, you are scuffling over a gun you wouldn't know which position the gun was in.

Q. Well, would it be more likely——. Do you recall scuffling with the gun at head level or down here (indicating)?

A. Well, I don't know, Mr. Grinnell.

. . . . . .

[fols. 1748-1751] Mr. Grinnell:

Q. What do you remember about the shooting that night?
A. The only thing that I remember about the shooting that we was wrestling over the gun, the gun went off and I don't know how many times the gun went off. I'll say it that way.

. . . . . .

[fols. 1752-1756] Q. However, you would agree with me, would you not, that if your shirt tail was out that gun would not have been visible to your wife?
A. It would have been covered up, it would have been concealed.

. . . . . .

[fols. 1757-1771] Mr. King: Just a moment if the Court please. Will he please identify——. We are talking about Mr. Travers. There were two statements to Mr. Travers, once in the morning and once where it was taken down by a tape recording.

Mr. Grinnell: Well, the only one we have typed up, Mr. King, is the one that was taped.

The Court: Mr. Grinnell, you should for the benefit of the witness tell him what——

Mr. Grinnell: Mr. Travers stated he told him the same story both times.

The Court: Well, that is beside the point. You are referring to a transcript.

. . . . . .

[fols. 1772-1774] Mr. Grinnell:

Q. Why didn't you call an ambulance, Mr. Atchley?
A. Well one reason I was scared.
Q. Or a doctor?
A. And I took off towards Palermo.

. . . . . .

[fol. 1775] Doctor Darius F. Caffaratti, M.D., a witness produced on behafe of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. King:

Q. Your name is——
A. Darius F. Caffaratti, M.D.
Q. And where do you practice medicine, doctor?
A. Oroville, California.
Q. You live here locally do you?
A. I do.
Q. And where is your residence?
A. 261 Canyon Highlands Drive, Oroville, California.
Q. Now, Doctor, do you know me?
A. I do.
Q. Are you acquainted with other people here?
A. I know Mr. Grinnell, and Mr. Atchley and Mr. Duensing and Judge Ware.
Q. Yes, and how close is that relationship? Is it a friendly relationship or what sort of a relationship is it?
A. Friendly relationship with all.

* * * * * * * *

[fol. 1776] Q. Now, doctor, will you tell us something about your schooling?

A. Well, I received my high school education at Belmar College Preparatory, San Jose, California. I took my pre-medical training at the University of Santa Clara and I received my doctor of medicine formal degree from St. Louis University in St. Louis Missouri in 1941.

The Court: Mr. King, it would help in following the testimony if you would state the purpose of the witness being called, are you qualifying him as a medical doctor or for some other purpose?

Mr. King: I am qualifying him for the dual purpose if the Court please, as a medical doctor and as a firearm expert.

The Court: You may proceed.

Mr. King: Thank you, Your Honor. (Questioning wit-

ness) Now, Doctor, going along with your medical training, what courses did you take in college that particularly bears on the field of ballistics?

A. I took advanced physics, advanced mathematics, ballistics is a division of physics, a science which has to do with the conduct and action of projectiles which are thrown forth and I have had—— .

Q. (Int.) What is a projectile?

A. And I have had mathematical and physical background.

. . . . . .

[fol. 1777] Q. Doctor, going back to your qualifications as a M.D., what other training have you had other than the general, your general training as an M.D.?

A. Well, I have followed firearms as a hobby for a period of 25 years and I have gone into the field extensively and [fol. 1778] with my scientific knowledge I have been able to comprehend the subject quite well.

Q. Now, dropping that for the moment and talking about your other pursuits that you have entered into in your regular field, in that of medicine, what hospital experience have you had, doctor?

A. Well, I interned at the Santa Clara County Hospital in San Jose, California and was resident physician at the Butte County Hospital and Medical Director and Superintendent of the Butte County Hospital here for four years.

Q. During that time, doctor, and since you have gotten a degree to practice medicine have you had occasion to be licensed in other states?

A. Yes, I have.

Q. And what states were they?

A. I have been licensed in Nevada, Missouri, Oregon and California.

Q. Have you practiced in any of those states?

A. I have not.

Q. You have practiced here in California since you have been licensed?

A. That is correct.

Q. Now calling your attention to your experience in the

Butte County Hospital as Medical Director, did you have occasion there to perform autopsies?

A. During my 10 years there as Medical Director of the Butte County Hospital I did almost all of the autopsies for the County of Butte, Coroner's Department during those four years, during that period I perhaps did more autopsies than all the rest of the physicians combined in Butte County. You understand at that time there was no [fols. 1779-1792] pathologist available and I was the best qualified man at that time.

. . . . . .

[fol. 1793] The Court: I think that you certainly have shown a proper, adequate foundation for Dr. Caffaratti as a medical doctor. Now, the term "firearms expert" is a very broad one and a man may know a great deal about some phases of firearms and might know little about something else. I want you at this time to bring your [fols. 1794-1814] questioning down to the particular qualifications which you expect to use. It would appear to me at this time that the only subject on which testimony of a firearms expert is necessary might be concerning the distance between the gun and Mrs. Atchley's dress.

. . . . . .

[fol. 1815] Q. (Int.) Now, doctor, I show you People's Exhibit 23-E, which shows a picture of the decedent lying on her back with a hole in her torso, with a black mark around it which I will inform you was put on by Doctor Richardson when he was being examined on direct examination, with a "1". Now the black mark around it is a crayon mark. I will put this on the board and ask you [fols. 1816-1826] examine that picture, doctor.

A. That wound is an irregular wound and if I can determine it correctly I can see what appears to be a brownish mark around in the skin beyond the regular annulus, that is superseded above the annulus. That is formed by the bullet itself, the little black stain, but over here surrounding this area there is what appears to be a brownish—I wouldn't say brownish on this picture, this is a black and white picture, but it is a dark area around there which on

this picture would closely suggest powder burns or smoke deposits.

Q. Would it from your experience and in your opinion be possible for the gun to have been held further away than 8 inches to make that hole?

A. I doubt very much if it could have been held further than 8 inches, certainly it couldn't have been held more than 10 inches. As I say it is impossible to put your finger exactly on an exact distance because of variations in even individual bullets or individual cartridges but I would say in my opinion that that muzzle was probably left closer than six inches and could have been closer than even four inches.

. . . . . .

[fols. 1827-1839] Mr. King:

Q. Now, doctor, examining the picture on the board you notice a stain on the back of the dress which has heretofore been identified as number five and we will hereafter refer to it as number five. Now, would you from your examination of the picture as you see it there explain what might have caused that hole?

A. Now, this stain here as far as can be determined on a black and white picture, would represent a blood stain. And, as I notice, it is remarkably more so than you found in the other holes. The other holes you have tiny markings but there is no predominant blood stain. There is a little bit here and there. One of the characteristics we know of wound entrance and wound exits is, assuming all of the factors to be equal, the wounds of exit always have more bleeding that wounds of entrance for the reason that as the bullet goes forward it blows out the pathway in such a way that the blood tends to go out. And so offhand without any further facility for examination I would say that has the appearance on that dress as a wound of exit.

. . . . . .

[fols. 1840-1843] Q. Did you find anything in examination of the gun, in firing the . rounds you fired, that indicated that particular gun might fire, throw a shell in any particular way?

A. Yes, we spent half the afternoon looking for some stray casings, although we went to the protection of covering it with a box to catch them, one went this way and the other way.

Q. However they all went to the right?

A. They all went roughly to the right but they went in varying degrees of distance.

* * * * * * *

[fol. 1844] Direct examination. (Resumed)

By Mr. King:

Q. Now, doctor, going back to bullet marks on the torso which have been depicted here as three, four and two, did you in your examination of the garment in your laboratory examine those particular holes in the garment for powder marks?

A. I removed some small fibers from each of the [fols. 1845-1847] openings.

Q. Speak about it please.

A. I removed a small particle of fiber from each of the openings with tweezers and placed them under the microscope for examination.

Q. What did your examination reveal?

A. There were small brownish particles in there which resembled flakes of unburned powder, resembled lamellae.

Q. Did your first examination of the garment indicate whether or not those holes were surrounded by some substance other than powder?

A. It is difficult to state that because actually the tear was irregular. It seemed there was a little discoloration at the margins. But with the naked eye the color of the garment was such that one could not be certain.

* * * * * * *

[fols. 1848-1851] Q. And, doctor, it is necessary, is it not, to pull the trigger?

A. With this type of weapon it is necessary to pull the trigger for each shot.

Q. In other words, somebody's finger had?

A. It is necessary to pull the trigger to release it and

then pull it again, otherwise the sear is not engaged. As I said, this is a self-loading and not an automatic weapon. For each shot it is necessary that the weapon be pulled back to discharge it and then the trigger must be released or re-engaged, and then you pull back again for another one.

* * * * * * *

[fols. 1852-1865] Q. And would you estimate the distance if you can—. Withdraw that question. Sometimes the shells are thrown at different distances from the gun?

A. On the whole I would say the average distance would be between about as far from you as to where this lady juror is approximately. That would be about the average length of the cartridge—the cartridge would be ejected.

Q. For the purpose of the record, if I were to tell you that was about five feet——

A. About five feet would be about right, between four and six feet.

* * * * * * *

[fol. 1866] Q. And they are marked, the shoes are marked People's Exhibit 30, the trousers are marked People's Exhibit 32 and the shirt is marked People's Exhibit 31, what in particular did you examine them for, doctor?

A. I examined them to see whether or not any stains were present that would resemble blood.

[fols. 1867-1868] Q. I will hand you the trousers, what was your examination, microscopic or otherwise?

A. Of the trousers?

Q. Yes.

A. I didn't make a microscopic examination.

Q. You just examined them outside just a moment ago?

A. Yes.

Q. And out of your office, is that correct?

A. I examined them here in the back room a few moments ago for the first time, and I found no gross evidence of blood stains on them. Inside the rear pocket I found a handkerchief which had some brown stains—I can not recognize for sure, might be blood and it might not, if it is it is old, I can't say for sure.

Q. Did you examine the trousers to see whether or not there was any apparent stains on them?

A. There were no noticeable stains on the trousers themselves.

Q. And none on the shirt?

A. I was not able to detect any stains that resemble blood on the shirt.

Q. And on the shoes?

A. I was unable to detect any stains on the shoes that resemble blood.

. . . . . .

[fols. 1869-1891] Cross-examination.

. . . . . .

[fol. 1892] Mr. Mulkey:

Q. Doctor, I believe we were on these holes marked two, three and four on the torso?

A. That is correct.

Q. And it was your opinion that the cartridges were fired from what distance regarding those wounds?

A. Well, as a general principle, due to the fact lamellae of unburned powder were found in the cloth that covered this area where these three wounds were, I would say as a general principle that the weapon was probably within 18 inches.

Q. This again is based on the fact that your tests show lamellae in a pattern are not discernible beyond 18 inches?

[fols. 1893-1895] A. That is correct, with this particular brand of ammunition, batch of ammunition and weapon.

. . . . . .

Q. All right. Now, then, dealing with the——. As I understand your testimony you concede there are four entrance wounds in the body, one in the breast and three under the shoulder, is that right?

A. That is correct.

Q. And you state that the fifth at the rear you believe to be an exit wound?

A. That is my opinion.

Q. Now, you place all of these four wounds, that you

concede to be entrance wounds, within 18 inches based largely on two factors: Your tests, which indicate lamellae can not be found in a discernible pattern beyond 18 inches, and, secondly, the testimony or report of Dr. Richardson, is that right?

A. That is correct.

. . . . . .

[fol. 1896] Mr. Mulkey:

Q. Could any of these wounds as indicated in the body and as further indicated on the dress have been inflicted at a distance in excess of 18 inches?

A. You wish my opinion or an absolute statement?

Q. I wish your opinion. Could they have been?

A. I would say no.

[fols. 1897-1899] Q. And you base that on two things: As regards wound number one, the half inch diameter?

A. (Nodding affirmatively)

Q. And as regards the remainder of the wound and wound number two the absence of a pattern of lamellae beyond 18 inches, is that correct?

A. With that specimen of ammunition that we used, yes.

Q. That's right, assuming the gun and the ammunition to be the same.

A. Correct.

Q. One other thing as regards this wound number one: You said this would not be in excess of four to six inches if the wound were half inch in diameter, is that right?

A. That is my opinion.

. . . . . .

[fol. 1900] Q. Does this garment—does the garment around the hole, the hole that is delineated on the plaster cast as wound number one, does that physical garment as you examined it in your laboratory whenever you did these tests last week, does that garment have the physical appearance as regards powder or lamellae that would comport with the wound inflicted by that gun with Super-X shells such as you used at a distance of four inches, six inches or right next to the body? Now, that can be answered yes or not, can't it, doctor?

A. I would say yes, within six inches or four inches.

Q. As you examined it in your laboratory it appears as if it could comport with the wound six inches away?

A. It could.

[fols. 1901-1947] Q. Well, now, just a moment. You are referring then to wound number four under the arm, is that right?

A. I am referring to wound number four, that is correct.

Q. All right. You are definite about that, that it has which you would describe as a powder burn around it, is that right?

A. I would say that is an excellent photographic image of what would appear to be a powder burn or a smoke smudge.

[fols. 1948-1960] Recross-examination. (continued)

By Mr. Mulkey:

[fols. 1961-2010] Q. Right, but you did not ever see the body of the deceased in this case?

A. I did not.

Q. Other than as it might be represented on a picture?

A. That is correct.

Q. You did not probe any of these wounds yourself?

A. I did not probe the wounds myself.

Q. And you were never around the body?

A. I did not even know the decedent as far as I could tell.

Q. And your estimate of distances as it relates to cloth again is based so far as your experiment was concerned, on the fact that no lamellae were present after 18 inches?

A. That is right, and very few present at 12 inches, very few showed I would say.

Q. Not beyond 18 inches?

A. Not beyond 18 inches.

Q. No powder granules, no nothing that could be associated with a gunshot——

A. (Int.) Not on my examination.

* * * * * * *

* * * * * * *

[fol. 2011] REBUTTAL TESTIMONY FOR THE PEOPLE

WILLIAM LEROY LEWIS, called as a witness by the People in rebuttal, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Mulkey:

* * * * * * *

[fol. 2012] Q. Now, you had delivered to you around the 4th of August by a Mr. Lazier a .22 *Ruger* automatic?

A. I believe it was on the 5th day of August that I examined the gun, yes, sir.

* * * * * * *

[fol. 2013] Mr. Mulkey:

Q. This was delivered to you in a plastic bag?

A. It was.

Q. Did you take that gun out of the plastic bag and examine it see if there were any fingerprints on it?

A. I removed the gun from the plastic container, examined it first by oblique light to see if there were any visible latent fingerprints on it. I found none. I subsequently dusted the gun with pow-er in an effort to develop any other prints that may have been on it.

Q. Did you discover any?

A. No identifiable latent fingerprints.

Q. There were no identifiable latent fingerprints on the piece at all?

A. No, sir.

Q. Did you examine the clip that inserts in the handle of the gun?

A. I removed the gun and dusted it off.

Q. And did you find any identifiable latent fingerprints on the clip?

A. No ridge formation on it.

Q. No ridge formations at all?

A. No.

Q. Then on the total piece, including the clip thereof, there were no identifiable fingerprints on it?

A. No, sir.

Q. Was there anything that you could call prints that would be unidentified?

A. There were fragments of ridge formations, but they contained little or no points of comparison under which——

Q. In other words, there wasn't any one complete print any place?

A. Not enough of any pattern or ridge formation to [fols. 2014-2025] permit comparison.

* * * * * * *

[fol. 2026] Mr. William Crowder, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Would you please be seated here, Mr. Crowder. Your name is William Crowder?

A. It is.

Q. And by whom are you employed?

[fol. 2027] A. I am employed by the Department of Motor Vehicles.

Q. And in what capacity?

A. I am a special investigator.

Q. And how long have you been employed by the Department of Motor Vehicles?

A. Oh, seven years.

Q. And during the time you have been employed by them have you had occasion to make the acquaintance of one Jack—no, Veron Atchley, also known as Jack Atchley?

A. I have.

Q. And about how long ago would you say you first became acquainted with Jack Atchley?

A. Approximately three years ago.

Q. And was that in connection with the business?

A. It was.

Q. And your relationship together has been on a business basis, is that correct?

A. That is right.

Q. Through the conduct of his business and by the very nature of your being employed by the Department of Motor Vehicles, is that correct?

A. That is right, sir.

Q. Now is it necessary at the present time and was it necessary in, we will say November of 1957 to have a bond from your department in order to operate a used car business?

A. That was a new law that was passed and it was passed by the legislature and required all dealers to put up Surety Bond in order to be licensed as a dealer.

Q. And did you contact Mr. Atchley regarding this bond?

A. I contacted Mr. Atchley on a business matter and in [fol. 2028] the course of this conversation pertaining to the business why the question of the bond came up.

Q. And do you recall about when this was, Mr. Crowder?

A. That was on November 20th, 1957.

Q. November 20th, 1957. At that time was Mr. Atchley in the used car business?

A. He was active as a dealer, yes.

Q. And what at this time was your conversation as nearly as you can recall concerning this Surety Bond required by your department?

A. I asked him if he intended to renew his license for 1958 as the deadline was November 30th for dealers renewals and he stated no, that he intended to go out of business, that he had enough of it, he didn't intend to go back into the business and I asked him at that time I said, "Is it because of the fact that you are unable to get a Surety Bond as required to continue in business" and he said, "Well, that is one reason for it." He said, "The other reason is" he said, "I think I will go back to Tennessee."

Q. Now what date did Mr. Atchley go out of the used car business?

A. He was officially out of the used car business as of January 1st.

Q. 1958?

A. 1958.

Q. And what time did you pick up his license?

A. I picked his license and supplies up on November 20th.

Q. On November 20th?

Mr. King: Was this 1957 or 1958?

[fol. 2029] The Witness: 1957.

. . . . . .

[fol. 2030] Q. Now sometime in June you, did you not, make a decision and asked for a complaint because you thought that Mr. Atchley was still in business without this license which you told us about?

A. I did, I filed a complaint.

. . . . . .

Q. Do you recall shortly after this complaint was filed [fol. 2031] whether it was in May or June, that you talked to both Mr. and Mrs. Atchley again, or either one of them separately?

A. Yes, after the complaint was filed I had occasion to talk to both of them.

. . . . . .

Q. She was upset with you because you had filed this complaint against her husband?

A. That was the idea, that is right.

Q. She was sticking up for him?

A. She certainly was, she sort of give me a little going over for having the audacity to cause him this trouble due to the fact he was selling cars without a State license. She didn't cause a commotion or anything like that but that was, I thought that was a normal condition.

. . . . . .

[fols. 2032-2033] Q. All right now, did you have occasion to talk to either Mr. or Mrs. Atchley following the trial of this matter in which you had filed the complaint?

A. Yes.

Q. And where was that conversation?

A. She wanted to contact me and made an appointment through another party and I met her at the Department of Motor Vehicles office one morning.

* * * * * * *

Mr. Grinnell:

Q. Can you tell me when and where this conversation took place?

A. It was approximately 10 days or two weeks after the trial, that is as close as I can give you on the date, I didn't make a notation of it.

Q. Sometime in the latter part of June?

A. Yes, it was in the same month, sometime about the end of June.

Q. And was this following the hearing in Court the 10th of June?

A. This was following the trial, yes.

Q. The trial, by the way, you appeared at the trial, did you not?

A. Yes, at that time.

Q. And Mr. Atchley appeared?

A. Yes, he did.

Q. However Mrs. Atchley did not?

A. She failed to appear.

* * * * * * *

[fol. 2034] Mr. Grinnell: Thank you. (Questioning witness) Now I believe the question, Mr. Crowder, was do you recall a conversation some ten days or so as you have said, after this trial in June of 1958?

A. Yes.

Q. And I believe you said that you recall that the conversation took place down at the office of the Department of Motor Vehicles down on Montgomery Street, is that correct?

A. That is right.

Q. And that is the conversation in which once again, Mrs. Atchley asked if she could talk to you?

A. Yes.

Q. You didn't go and seek her out?

A. That is correct.

Q. And do you recall who was present at that time besides yourself and Mrs. Atchley?

A. There was no one else present because I took her back in the Highway Patrol room, in private, to hear what she had to tell me.

Q. All right, can you tell me at this time what she told you?

A. She apologized for the fact she couldn't attend the trial as she was subpoenaed to due to the fact she didn't want to commit perjury and also she told me that she had been threatened with bodily injury if she did attend that trial and bring her children with her and furthermore she stated Mr. Atchley was still in the used car business. Those are the exact words that she told me.

Q. Let me see if I understand you correctly, she told you if she testified she did not want to commit perjury?

[fol. 2035] A. That is right.

Q. And that if she had testified she would have committed perjury or she would have done what, now what would have happened to her?

A. She said she was afraid, she was threatened with physical injury if she did not testify.

Q. Did she tell you who threatened her?

A. She said Mr. Atchley told her that.

Q. And is that why she told you she hadn't shown up for the trial?

A. That is what she told me.

. . . . . .

[fols. 2036-2038] Cross-examination.

By Mr. King:

. . . . . .

[fol. 2039] Q. From your dealings with them they had a [fol. 2040] pretty good little business there?

A. Yes.

Q. Not a tremendously lucrative business but perhaps—you know how many cars they would sell, they were doing a little business, not a big business.

A. I have a pretty good idea of what they were doing.

Q. What were they making?

A. They were making a comfortable living.

Q. But nothing astounding or anything of that sort, I mean they weren't making several thousand dollars a month.

A. No.

Q. Just selling junker cars?

A. Yes, but you can make six or eight hundred dollars a month selling junker cars if you are in the business and know your way around and Mr. Atchley knows his way around in the used car business.

Q. What did you say?

A. He knew his way around in the used car business and he could make a comfortable business that way.

. . . . . .

Redirect examination.

By Mr. Grinnell:

Q. Do I understand you have actually been out there when you have seen Mrs. Atchley, his wife, the woman who was shot, you actually saw her trying to run the business?

A. Yes, I have seen her out there trying to sell cars to customers, in fact I talked to some of them.

. . . . . .

[fol. 2041] MR. CARMEN CRANE, a witness produced on behalf of the people, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Now, Mr. Crane, you have already been sworn in this case once, so it isn't necessary to swear you again and I believe in your earlier testimony you testified that you arrived at the scene sometime after Officer Brush from the Sheriff's Office arrived in the early morning of August 3rd, 1958, is that correct?

A. That is correct, sir.

Q. And prior to the time that Mrs. Atchley was removed from the scene was any examination made of the contents of either one of her hands, in other words as you viewed her lying on the ground there did any one including yourself examine the contents of her hands?

A. No, we did not examine either hand, sir.

. . . . . .

[fol. 2042] Q. (Int.) How long did the body lie there before it was removed?

A. Approximately—after I arrived I would say approximately 20 to 25 minutes.

Q. And were you there—by the way, who removed the body?

A. That was removed by the Block Funeral Chapel.

Q. And what are the names of the gentlemen who put her on the gurney, isn't that what you call that little thing?

A. Yes, sir, that was Mr. Bill Manes who is the present owner of the establishment and his assistant and I believe two of our officers.

Q. Where were you and Officer Brush standing when these men from the mortuary arrived to take Mrs. Atchley to the mortuary?

A. I was standing slightly to the rear and near the sidewalk, I didn't help in that procedure.

Q. You did not assist in putting her on to the guerny?

A. No, sir.

Q. Before she was put on to the guerny she was rolled over on her back, was she not?

A. Yes, sir.

Q. Now when she was rolled over on her back—by the way, the picture you see on the wall, that is the picture as she was found when you arrived, is that correct, lying in that position on the ground, referring, Your Honor, to [fol. 2043] People's Exhibit 17-A in evidence, showing her lying on her left side.

A. Yes, sir, that is the position.

Q. Now you see her right hand there, do you, Mr. Crane, in the photograph?

A. Yes.

Q. And it appears, does it not, to be clinched up more or less as one would clinch up there hand to make a fist, is that about the way you would describe it or would you describe it some other way?

A. That is about the way I would describe it.

Q. The fingers aren't extended, the hand is closed?

A. The hand is closed and cupped.

Q. Now as she was rolled over where were you standing?

A. I was standing at her feet.

Q. Prior to the time she was moved I believe you said that there was nothing—no examination of her hands, is that correct?

A. That is correct, sir.

Q. Referring to People's Exhibit 16-E, she was first rolled over on her back before she was put on the guerny, is that correct?

A. This is the position after she was turned over on her back.

Q. Now what happened, were you standing there watching as she was rolled over on to her back from her left side as she lay down on the ground like this with her hand down like this and she was rolled over on her back (Mr. Grinnell lays down on floor and demonstrates). What happened to that right hand, were you watching?

A. Yes, sir.

[fols. 2044-2053] Q. What happened as far as that right hand is concerned?

A. As soon as the hand and the body was removed I observed that the keys were lying directly beneath the hand, that is where the hand had been.

Q. Very well now, would you please examine these keys at this time, Captain?

A. (Witness does as requested)

Q. Have you had a chance to examine them?

A. Yes, sir.

Q. Do you recognize those keys, Captain?

A. They are the keys.

Q. Those are the keys that were found under her hand when she was rolled over, is that correct?

A. That is what I observed on the ground, yes, sir.

[fol. 2054] RICHARD BRUSH, called as a witness by the People in rebuttal, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. I believe the first time you testified, Officer Brush, that you made a diagram, or a diagram was prepared under your direction and control, a diagram which has been admitted into evidence and is tacked up on the board at this time. Is that the diagram which you had prepared?

A. Yes, it is.

Mr. Grinnell: For the record that is——

The Court: Exhibit "11".

Mr. Grinnell: People's "11".

[fols. 2055-2075] Q. And in that diagram I believe that you have indicated where the brass cartridges, the part that is ejected from the firing chamber of the gun—not the part that goes out the barrel but the brass part of it—you understand what I mean?

A. Yes.

Q. The cartridge part of it. You have indicated on your diagram, have you not, where those cartridges—cartridge cases were found?

A. Yes, I have.

Q. Now, before we go any further, do you know an individual, a young man, by the name of John White?

A. Yes, sir.

Q. He is presently one of our trusties, is that correct?

A. Yes, he is.

Q. Do you recall at this time seeing John White at the scene at 384 Nevada Street on the morning of the murder, that being Sunday morning?

A. No, sir, I don't.

Q. At any time?

A. No, sir, I don't.

Q. You do know him however?

A. Yes, I do.

Q. Did he either point out or hand you any of these five brass cartridge cases which you labelled and which have been introduced into evidence?

A. No, sir, he didn't.

. . . . . .

[fol. 2076] Mr. Bruce Grinnell, a witness produced on behalf of the People, after being first duly sworn, testified as follows:

. . . . . .

[fol. 2077] Cross-examination.

By Mr. King:

Q. How many pounds?

A. Several.

Q. Would you say 6 or 8?

A. No, several, two or three.

Mr. King: Thank you, Mr. Grinnell, no further questions.

The Court: That is all, Mr. Grinnell.

Mr. Grinnell: Now we have some more witnesses, does the court wish—I would imagine, Your Honor—both will be on the stand for probably an hour a piece, they are the daughters of the deceased.

The Court: I think we can start with the examination.

Mr. Grinnell: Certainly if you wish, the only thing I

don't see that we can complete either one of them tonight and I just wanted to——

The Court: (Int.) That is allright.

Mr. Grinnell: Would you call Barbara Ferris.

Miss Barbara Ferris, a witness produced on behalf of the People, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Grinnell:

Q. Barbara, would you step over here please and will [fol. 2078] you please be seated. Now, Barbara, you are how old once again, how old are you once again?

A. 14.

Q. You are 14 and will you be 15?

A. February 2nd.

Q. February 2nd?

A. Yes.

Q. 1959?

A. 1959.

. . . . . .

Q. And when did you come to California?

A. In 1949 I think.

Q. In 1949?

A. Yes.

Q. That would be about 9 years ago, is that correct?

A. Yes.

Q. And upon your arrival in California where did you first live?

A. Fresno.

Q. In Fresno, California?

A. Yes.

. . . . . .

[fol. 2079] Q. And how many brothers and sisters do you have?

A. Two brothers and two sisters.

Q. Two brothers and two sisters and what are their names?

A. Donna, Ernest and Junior and Brenda.

Q. And you are the oldest?

A. Yes.

Q. And how old is Donna?

A. 13.

[fol. 2080] Q. And how old is Ernest?

A. 11.

Q. And what is the next one?

A. Junior, he is 6.

Q. He is 6?

A. And Brenda is 4.

. . . . . .

[fol. 2081] Mr. Grinnell:

Q. How large a woman was your mother, Barbara?

[fols. 2082-2085] A. She weighed about 145.

Q. And how tall was she?

A. Five foot two.

Q. Five foot two, do you have any idea how tall Jack is?

A. He is about five eleven.

Q. Then it is not true in your opinion then that your mother was a larger person than Jack Atchley?

A. No.

Q. And do you recall that your mother had a naturally long arm?

A. No.

Q. Anything about her arms that you recall at this time being unusually long?

A. She had short arms and her hands were small.

. . . . . .

[fol. 2086] Q. Thursday, and can you tell us what happened that Thursday afternoon?

A. Well, he came to the house.

Q. Who came to the house?

A. Jack did and we weren't home but we seen him down in Gridley and he wanted her to sign her name off the pink slip and mom said she didn't want to and he said, "You

are going back to the house and when we get there—" and mom goes down to the City Hall.

Mr. King: What is that now?
The Witness: Down to the City Hall.

Mr. Grinnell:

Q. Is that where the police station is?
A. Yes, in Gridley.

. . . . . .

[fols. 2087-2088] The Witness: She went down to the City Hall and told the police or somebody down there, I didn't go in with her, but she came back out and went back out to the police car across the street and Jack was——

. . . . . .

Q. The police officer arrived there ahead of you?
A. Yes.
Q. And was Mr. Atchley there at that time?
A. Yes.

. . . . . .

[fol. 2089] Mr. Grinnell:

Q. Certainly she can, but when you were talking about, "He" you mean Mr. Atchley?
A. Yes.
Q. Allright, go ahead and tell us what Mr. Atchley said.
A. He was talking about, telling the officer about the, mom drawing the State Aid and married to him and mom she goes and tells the policeman that he is selling cars without a dealer's license and names the cars and all that and Jack gets mad and when the cop leaves he said he would pay her back one way or the other with either us or with her.
Q. When the officer arrived Jack said to your mother, "I will pay you off one way or the other"?
A. No, that was after he left.
Q. After who left?
A. The policeman.
Q. That isn't what I said, after the policeman arrived

Jack said to your mother, "I will pay you off one way or the other"?

A. Yes, after the officer left.

Q. Would you describe his attitude at that time?

A. Well, I was in the door.

Q. Did he raise his voice, did he appear to be angry—or upset or did he just say it as if he was commenting [fols. 2090-2091] upon it was a nice day?

A. Well, he was angry.

Q. And was your mother angry?

A. She talked louder than what she usually does.

Q. Then did you feel that both of them were angry at that time?

A. Yes.

• • • • • • •

[fols. 2092-2093] Q. Now do you recall at this time what that conversation generally was about when the utility man came there to hook up the utilities?

A. Well, Jack said he didn't want the light bill or gas bill or some bill in his name and mom told the utility man to put it all in her name and so he said, "I can't hook it up that day" and he never did get it hooked up.

• • • • • • •

[fols. 2094-2112] Mr. Grinnell:

Q. Now calling your attention to that night and we are talking about the night after the night of the—calling your attention to the evening following this event which we have just discussed in which the utility man had been there, did your mother write a letter in your presence to Judge Savage?

Mr. King: Just a moment.

The Witness: Yes.

• • • • • • •

[fol. 2113] DOCTOR JAMES LOWE RICHARDSON, a witness recalled on behalf of the People, having been previously duly sworn, testified further as follows:

[fol. 2114] Direct examination.

By Mr. Grinnell:

Q. Now, Doctor Richardson, you recall testifying in this case of the People vs. Atchley in this Courtroom the other day, do you not?

A. Yes.

Q. And I believe you testified that you performed an autopsy upon the decedent, did you not?

A. I did.

Q. And as part of your autopsy you probed the wounds in the body, did you not?

A. Yes.

Q. And in an attempt to determine the path of the bullets or bullet through the body, is that correct?

A. Yes.

Q. And that you were able to determine that, by probing, that the hole in the left breast went straight through the body at an angle and you have indicated in the back on this plaster of paris figure where that bullet exited, did you not?

A. I could determine the path of the bullet, I couldn't determine at the time of autopsy which was the point of entrance and which was the point of exit.

Q. And we are referring to this No. 1.

A. That is right.

Q. Is that correct?

A. Yes.

Q. And then I believe you testified that you probed these other wounds indicated 2, 3 and 4 and that you found the path to be roughly parallel through the body, is that correct?

A. On two of these.

Q. On two of those, and one of them you followed the [fol. 2115] path into the backbone and lost it, is that right?

A. Yes.

Q. Somewhere in that region?

A. Yes.

Q. Now, doctor, do you recall being asked about No. 5 and I believe that you are the one who wrote the number on it, are you not?

A. Yes.

Q. And we are referring to the one in which you have labeled No. 5, the one being to the right of the backbone in the decedent's back, do you recall examining that bullet wound—which do you prefer to call it, a bullet wound or a bullet hole?

A. Bullet wound includes the tissue damage.

Q. Do you recall examining that?

A. Yes, I do.

Q. And did you probe that wound, doctor?

A. Yes, I did.

Q. And would you once again tell us how you probed that wound and in what direction you found the path of the bullet to be?

A. Well, that wound was probed at the time the chest was opened and the probe was seen from the front part of the body in the same area as the wound No. 4 was found, the two probes going in the same and being in the same area in the back bone.

• • • • • • •

[fol. 2116] Q. You haven't had that benefit, have you? All right, may I ask you, doctor, if in probing these wounds it is possible as a result of your examination of the body for either one of these three under the right arm pit to have gone through the body in this fashion and that actually No. 5 was the exit hole for any of these three under the right arm pit?

A. Yes, that is possible and that is what I thought at the time of autopsy.

Q. However, after you examined it further, what was your conclusion?

A. After examining the dress, there are powder marks around the holes in the dress corresponding to No. 1, 2, 3, 4 and 5.

Q. Now you personally examined the dress yourself, did you not, doctor?

A. Yes, I did.

Q. And you are talking now about the dress in the area

[fol. 2117] of No. 5, and I believe you were present down at the Criminal Identification Laboratory on one occasion when it was examined, were you not?

A. Yes, I examined it.

Q. Was there any foreign substance placed upon that dress at any time while you were there during your examination?

A. No, not to my knowledge.

Q. However were certain fibers, as Doctor Caffaratti has used the phrase, "Teased"—are you familiar with that phrase "Teased"?

A. Yes.

Q. Were certain fibers or material teased from around this hole by yourself or Mr. Burd and examined for evidences of either gunpowder or a bullet passing through that hole?

A. Yes, Mr. Burd made that examination.

Q. And did you also?

A. No, sir, I did not.

Q. Did you examine the dress under the microscope in that area?

A. Yes, I did.

Q. And did you observe the presence of gunpowder, unburned gunpowder or lamellae or whatever it is referred to around the hole in that area?

A. Yes, I did.

Q. Now you have testified a moment ago that you thought at first that it could possibly be that one of these shots had gone through the torso in this fashion (demonstrating on torso).

A. Yes.

Q. However, in view of the presence of the gunpowder which you observed yourself, you personally examined the dress, did you not?

A. Yes.

[fol. 2118] Q. And you personally observed these—by the way, doctor, how many autopsies have you performed in which the victim has been—in which the victim has had gunshot wounds?

A. Approximately 75.

Q. About 75, so that this is by no means the first case that you have been associated with in which the deceased or victim has been shot, is that right?

A. No, this wasn't the first case.

Q. And I believe you said you personally observed, once again, the substance left by the powder around this hole (indicating)?

A. Yes.

Q. Then it was your conclusion instead of the bullet going in in this fashion (demonstrating on torso) it had gone in in this fashion and into the backbone, is that correct?

A. That is correct.

Q. In addition to that did you from an examination of the wound, was there anything about the wound that led you to believe the bullet had entered at an angle?

The Court: What photograph are you referring to?

Mr. Grinnell: Excuse me, Your Honor, that is People's Exhibit 23-A, in evidence. (Questioning witness) What about the description of the wound itself that lead you to believe in addition to these other things you have told us that the bullet had gone in at that angle?

[Vol. 2119-2121] A. Well, the wound itself might be described as oblong with the longer portion being on a level with the body, that would be in an upright position.

Q. Would it be a fair statement to say the wound appears to be somewhat egg shaped?

A. Yes.

Q. And that is represented in the picture, is that correct?

A. Yes.

Q. And that is circled and a number 5 has been drawn around it, is that correct?

A. Yes.

Q. Did you find any other hole on her torso, on her body which had that egg shaped appearance other than No. 5? Would you examine, and for the record, Your Honor, the doctor is examining photographs of the deceased 23-C and 23-D in evidence.

A. If I might refer to that other picture, there was this one abrasion that has been described that hasn't been marked and that was on the back of the right shoulder, that was not a through and through wound and appeared to me to be from some other cause.

Q. My question, doctor, refers specifically to bullet wounds in the body.

A. The one in the—just over the left breast is irregular and was probably fired at somewhat of an angle.

Q. The one in the left breast is irregular but it is not an oblong hole, it is generally speaking a round hole, is it not?

A. Generally speaking.

• • • • • • •

[fol. 2122] Mr. Grinnell: (Questioning witness) Now, Doctor, there is a difference, is there not, when we talk about bullet wounds and bullet holes, doesn't a bullet [fol. 2123] wound incompass something different besides, in addition to a bullet hole?

A. A wound would include this surround tissue damage.

Q. The surround tissue damage so that if we were talking about a bullet hole we would not necessary be talking about the surrounding tissue damage. If we were talking about a bullet wound we would be talking about the hole as well as the surrounding tissue damage, is that correct?

A. That is correct.

Q. Very well, now, I believe you described this bullet wound as you have said, as approximately a half inch in diameter, is that correct?

A. That is correct.

Q. And why did you find this, is you know, why did you find this bullet hole to be larger, if it was, than any of the others?

A. That I don't know why, I don't—anybody can say why it was larger.

Q. Was there anything different about this than the others?

A. There was considerable more tissue damage around, yes.

Q. And are you able as a doctor from your experience in gunshot cases to explain that?

A. No, I am not.

Q. Does it have in your opinion, doctor, anything to do with the relative position of the gun in relation to the body?

A. No.

Q. In other words the gun could have been 50 feet away as well as 10 feet away or against the body and it would have made no difference in your opinion regarding the size of the hole?

A. That is correct, you can't tell from the size of the [fol. 2124] hole the position of the gun, some holes from guns fired at a distance are certainly greater than those fired from close up in that the bullet starts to wobble, doesn't run a true course.

Q. As a matter of fact, in most of your examinations, doctor, isn't the point of exit usually on holes larger than the point of entrance?

A. That is only a generalization, it isn't of specific cases. We usually feel that is the situation however, and that is the situation I felt in this case.

Q. Is that right, you said first you didn't know which that was (indicating)?

A. Yes, it was my opinion that the wound in the front, No. 1, was theh point of exit and the one in the back, No. 1, was the point of entrance, however, as I say that is only because of the generalization that you say that the entrance wound is smaller than the exit wound, specifically it doesn't have to be at all.

Q. In this case what you have determined to be the exit wound was smaller than the entrance wound?

A. Yes, that is correct.

Q. And the reason you have come to that conclusion is because of the powder, is it, around the dress in the front?

A. And the fact there was no hole in the dress in the back corresponding to No. 1.

Q. No hole in the dress in the back to show it had entered at that point, so on this, just examining the torso bare you couldn't tell, but having the additional factors, [fol. 2125-2127] it was your determination then that this was a point of entrance.

A. It would have to have been, that was the one in the front, was the point of entrance.

Q. Now in addition, doctor, I assume when you examined this lady, that she was in the condition that she is represented in this picture?

A. Yes, that is true.

Q. And you actually—how long did it take, doctor, to perform this autopsy?

A. Approximately two hours as I remember.

Q. And you have testified you probed all of these wounds, is that correct?

A. That is correct.

Q. And in the course of probing it, of course you realized that this was a gun shot wound did you not?

A. I did.

Q. And from the number of which you had posted previously were you or were you not interested in determining whether or not there was a presence of any gunpowder upon this torso?

A. Yes, I was.

* * * * * * *

[fol. 2128] Mr. Grinnell:

Q. What are those marks if any, in those photographs that appear to be powder marks, Doctor Richardson?

A. Well, there are numerous blood spots on the body, there are some skin blemishes on the body and that is what it appears to be.

Q. From the photographs?

A. From the photographs I see no powder marks.

Q. Well, whatever those marks are in the photographs, they appeared as they appear and they were blood spots or blemishes on the skin and not powder residue or powder marks?

A. That is my opinion.

Q. And you examined the body?

A. Yes.

Q. And I want to also call your attention to 23-A showing the back and ask you around the hole in the back if you see anything other than——

Mr. King: (Int.) Will you identify that picture for the purpose of the record?

Mr. Grinnell: 23-A.

The Witness: There are of course some marks now that have been placed on there in pencil or crayon. There were numerous blemishes on the back that might be described as small pimples or such there.

Q. But there were no powder marks or powder residue? [fol. 2129] A. I didn't see any.

Q. Now, doctor, getting back to the hole in the left breast, a few moments ago we said there was a distinction between wound and hole, how large was the hole in the left breast as distinguished from the wound in the left breast?

A. The hole was irregular, the edges were ragged, some parts were extending out to what might be said the outer portion of the wound with the wound itself being approximately a 16th to an 8th of an inch larger in circumference than the hole in general.

Q. Could you tell us approximately how large the hole itself was?

A. As I say it was irregular in shape. It was a rather jagged wound, it wasn't round, some portions were, as the skin lay in the first examination were not over a quarter of an inch and then there were tears extending out to make that part of the wound three eighths to a half an inch.

Q. Do you, from your experience, recall or know of any reason why that might have appeared that way?

* * * * * * *

[fol. 2130-2132] The Witness: No, as I said in many of the instances in bullet wounds there is no explanation for the appearance of that particular wound.

Mr. Grinnell:

Q. And could it be that it was fired at a slight angle?

A. From the direction of the wound I have indicated that it was fired at a slight angle.

Q. Could that be the reason it appears that way—your experience?

A. It could be, it doesn't have to be.

* * * * * * *

Mr. Grinnell:

Q. I have in my hand, doctor, People's Exhibit 23-C and 23-E once again, and I am going to show you a dark-

ened area around this hole No. 4 and a darkened area around this hole No. 1 in the left breast and ask you if that could from your examination of the wound as you examined them, if that could possibly have been powder (pause) because that is what Doctor Caffaratti——

. . . . . .

[fol. 2133-2135] A. I am not sure I see any darkened area around the wound or at a distance from the wound. The wound itself is somewhat darkened, more so on the number one that on number four. But there is nothing here I could identify as powder and there was nothing at the time of autopsy that I identified as powder.

. . . . . .

[fol. 2136-2137] Redirect examination.

By Mr. Mulkey:

Q. Doctor, if this gun were held against the flesh there would have been powder burns or powder residue on the flesh, would there not?

A. If it had been held against the flesh, yes, I am sure there would.

. . . . . .

[fol. 2138] Mr. Grinnell:

Q. The question is this, doctor: "Assuming that the gun was held against the body, within just a very few inches of the body, would you expect to find powder burns or unburned powder around the wound or the bullet hole"?

A. If it were held against the body I would expect to. As far as the distance away from the body, I would rather not make a statement.

Q. Doctor, once again in your opinion is there anything inconsistent with the hole as you observed it, the structure and all of the findings? Is there anything inconsistent with your findings concerning this hole with a bullet being fired from three feet or more away from the body?

A. No, there isn't.

Q. In your opinion?

A. No.

Q. And we are talking now solely of your findings in connection with the hole itself.

The Court: Which wound are you referring to?

Mr. Grinnell: Number one in the left breast.

[2139-2140] Q. Your opinion is that it could have just as well been fired from three feet or more as well as closer?

A. That's true.

* * * * * * *

Re-cross examination.

By Mr. King:

Q. And going right along with that same thought, doctor, it could have been held closer to the torso?

A. Than three feet, that's true.

Q. And it might have been held within six inches of the torso as far as you know?

A. That's true.

Mr. King: Thank you.

Redirect examination.

By Mr. Grinnell:

Q. But you could say it wasn't against it because of the powder burn or lack of——

A. I don't think it was against the dress.

* * * * * * *

[fol. 2141] Barbara Ferris, called as a witness by the Plaintiff in rebuttal, having been previously duly sworn, testified as follows:

Direct examination. (Resumed)

By Mr. Grinnell:

Q. I believe when we adjourned yesterday, Barbara, that we were talking about a letter which your mother had written Friday evening. Do you recall that?

A. Yes.

Q. Now, can you recall about what time that evening [fol. 2142] your mother wrote this letter?

A. It was about 10:00 o'clock.

Q. About 10:00 o'clock?

A. Yes.

Q. And that would have been Friday the 1st of August, is that correct?

A. Yes.

Q. Where did this take place?

A. At our house in the living room.

Q. Where was this? Where were you living at that time?

A. At Gridley.

Q. You had been living in Gridley since Tuesday, the 29th, is that correct, as you testified yesterday?

A. Yes.

* * * * * * * *

Mr. Grinnell:

Q. I am going to show you four pages of handwriting and ask you if you recognize the handwriting at this time, Barbara?

A. This is her writing.

Q. And is that the letter that you saw her writing that Friday evening about 10:00 o'clock?

A. Yes.

Q. Was it the following evening, Saturday, that you went to the dance with your mother following the writing of this letter?

A. Yes.

Q. So that this was written then the evening before you went to the dance at Robinson's Corner?

A. Yes.

* * * * * * *

[fol. 2143] Q. When your mother finished writing this letter, Barbara, where did she put it?

A. On the radio.

Q. And was it still there the following day?

A. Yes.

Q. After she was shot?
A. Yes.
Q. And was it handed at that time to the officers?
A. Yes.

Mr. King: Who handed it please?
The Witness: My sister.

Mr. Grinnell:

Q. Donna? Is that correct?
A. Yes.
Q. And was handed to Captain Crane at about 11:50 the next morning, is that correct?
A. Yes.

* * * * * * *

[fols. 2144-2145] Mr. King: May I ask that the witness be inquired of whether or not the letter stayed there all during the day Saturday? It was written on Friday. Was it there on the radio all day Saturday or not?
The Witness: It was there all day.

* * * * * * *

[fol. 2146] Mr. Grinnell: Thank you, Your Honor.

This has been identified as a letter written on Friday evening, at 10:00 o'clock in the deceased's handwriting, dated 8/1/58, addressed to Judge Savage, S-a-v-a-g-e:
[fol. 2147] (Reading:)

"Just got back from town. Tryed to talk to Keath and the Sheriff Dept too but they just did not seem interested you see I have been drawing ANC. have 5 children to feed today I was moving all right but did not have my stuff all out. Just started to move and my check did not come. Mr. Veron Atchley went down because he was mad at me for moving told them I had moved so they held my check up. I have tryed to get my SSC from the kids father but so far I have not recieved it then the idea of holding someing up just because someone like that thing Atchley goes in tells a lie. Just to get me messed up he has told me in

front of my kids that if I ever moved Id be sorrow and just what he means I do not know but I am afraid of him & what he might do to the kids too he don't like them enough to support them he would not feed them at all he said they were not his to suport he had his way so long he thinks the law wont bother him for nothing for one thing. When he gets to drinking he puts his gun in the car under the floor matt carrys it with him for a bluff or something if he can do any thing and get by with it he sets around braggs about it. He made me pay 60 dollars per mts. rent then ask me to move threaten me and the kids if I had any aid stopped it. I said I was. He put his clothe in the car be gone 3 or 4 days or a week one time then come back. If he gets ahold of this he will kill me I know. That is why I was not in [fol. 2148] Cort when they had him up for selling cars without licenses which he is I know. But he would not let me say anything if I did he would threaten me if some one would do away with his pistol he would stop bragging what he can get by with then. I am mailing you this letter with a list of cars to check. I am not doing it because I am mad it is because he was the cause of me staying on State Aid then went down had my aid stoped to try to get me in troble. And I can prove it so why sence he has money to get a lawer to fight his cases I don't have milk money why don't they make him pay back what I drawed for my self if was not my fault that he lyed about suporting the kids he flat refused to feed them at all or me ether. He made me pay 60 a month rent allso. I have profe of that too he thinks that if they give me troble over it he will set back laugh about it after all he is smart that way.

"Why don't you all check on a 40 white ford coupe sold last Saturday to the Judge's son in live Oak the check was made out to Kenney Gardner 17 years old. But he never sold the car he was there in the house. When the Boy come after it all so he sold a poniac to a guy working at the White Eagle gas stashion on the Truck route and a 53 Willie to Bob Marlow went took Bob over to Gridley to borrow the money then one week later got Hinnimon in Gridley to make out a report of sale like they sold them. But Bob drove the Willie 3 weeks before he sold it to him then he bought a pickup from Oroville trailer Sales. Sold [fol. 2149] it to a boy in Palermo too. Then he sold the 58

fairlane 500 Ford to Russels Motors bought a Nash 55 Rambler all so sold a pickup to Bill somebody a old man across from Mrs. Harmys and traded a Cadilac 48 for the 40 ford he sold last Saturday. But Judge Ill bet he gets out of this and laught at me about it. Besides he cause me a lot of troble when he dose. But just check this out see for yourself if it isnt true he is just plain luckey or something but hope he pays for it all."

. . . . . .

[fol. 2150] Q. And you knew that your mother had been over to Oroville to see the welfare department and the District Attorney's office about this check, did you not?

A. Yes.

Q. And you knew that your mother was upset about this, did you not?

A. Yes.

Q. By the way, did your mother go with you quite often?

A. No.

Q. She didn't? How did it happen that she took you to the dance that Saturday night?

A. Well, I wanted to go out to see what it was like. A bunch of kids went so I asked her to go, to take me, and she said okeh. And she would take my sister next Saturday.

Q. And so then she was taking you to the dance then because you wanted to go?

A. Yes.

Q. And she wasn't letting you go by yourself? She was going with you?

A. Yes.

Q. And did your mother go with anyone besides you and the Wagners?

A. No.

Q. As far as you know did she meet anyone there?

A. No.

Q. I believe that you testified that you didn't see her talking to anyone, any man, or any two men, either going to or coming from the car?

A. I didn't see her talking to anyone.

[fol. 2151] Q. Did your mother dance with anyone that night?

A. No.

Q. How would you describe her that night? Was she tense, was she happy, did she seem to be upset about anything? Did you know that anything was troubling her?

A. Well, I sit over with Anita and Bob. She was talking to Carleen sitting there, a friend of hers, and right after the dance she said she felt like something was going to happen. And I was scared then. But she took us home.

Q. Other than that she didn't appear to be upset, is that correct?

A. (Nodding affirmatively).

. . . . . .

Q. About what time did you leave the dance that night?

[fol. 2152] A. About 12:15.

Q. Did you go from the dance directly to your home?

A. Yes.

Q. What would you estimate it took you to drive home from the dance?

A. About 20 minutes, 15, 20.

Q. When you arrived home was the front porch light on or off?

A. It was on.

Q. It was on? And did your mother drive in the driveway or stop in front? Or where did she park the car?

A. She left the car parked in the front.

Q. She didn't pull it into the side there where the carport is then?

A. No.

Q. Then you and your mother and the Wagners went in the house?

A. Yes.

Q. Why did you——

Mr. King: May I interrupt just a second please.

Mr. Grinnell:

Q. Why did you go in the house, all of you?

A. Anita had my dress and slip on and she wanted to put her other clothes on, so we went in there, and Mom pulled her shoes off and put her flats on, and before she left she put her other ones on, she put her other shoes on

and we turned the radio on, and they were there 15 to 20 minutes dancing.

Q. Who was they?

A. Anita and Bob, me and Mom.

Mr. King: How many minutes was this?

The Witness: 15 to 20.

* * * * * * *

[fol. 2153] Mr. Grinnell:

Q. So that you stayed there some 15 or 20 minutes before your mother left to take the Wagners home, is that correct?

A. Yes.

Q. Now, what did she say or what did she tell you when [fol. 2154] she left to take the Wagners home?

A. She told my——. My brother was up and she said to go right to bed and leave the front door unlocked.

Q. Anything else?

A. She told me to leave the light on and watch the little ones so they wouldn't wake up.

Q. Did she say anything about when they would be back?

A. No. She said be back as soon as she could, as soon as she gets them over there to their house.

Q. Was that the last time you saw your mother?

A. Yes.

* * * * * * *

[fol. 2155] Q. Now, do you recall an incident, Barbara—and I believe as near as I can recall from Mr. Atchley's testimony it occurred when your mother was in the hospital and you and your stepfather Mr. Atchley came down to the sheriff's office one evening.

A. Yes.

Q. Do you recall what that was about at this time?

A. It was about Brenda.

Q. What was it about, if you recall?

A. Well, he said Brenda was his daughter, but she isn't.

Q. Or if she is you don't know that to be a fact?

A. Well, I know she is not his.

Q. Do you recall any other reason why you were at the sheriff's office that night?

A. No.

Q. Did it have anything to do with you?

A. Not that I remember.

Q. Were you complaining to the sheriff's office about any treatment that you were getting or not getting from your mother?

A. No, I wasn't.

Q. And did that occur during the time that your mother was in the hospital?

A. Yes.

Q. Then how did it happen that you and Mr. Atchley went to the sheriff's office then?

A. Well——

[fol. 2156] Q. To see Mr. Rushton?

A. Who?

Q. I believe he has been identified as Officer Rushton.

A. I thought it was Anderson, but I don't know. I came down to the car the afternoon and Mom was in the hospital and I asked Jack to sign a paper for me and he said he would.

Q. Sign a what?

A. A paper.

Q. What kind of a paper?

A. For a TB test, I think at school, and he said he would sign it and just got talking and all I said to the policeman were the ages of the kids.

Q. Then are you quite certain—I want to be very certain, Barbara, that you were not there with Mr. Atchley because of any complaints that you were making to the officers about your mother?

A. No, I wasn't.

Q. Have you ever complained to anyone about your mother?

A. No.

Q. Have you ever complained to Mr. Atchley about your mother?

A. No.

Q. Has your mother ever mistreated you?

A. No.

Q. Or any of your brothers or sisters?

A. (Nodding negatively).

Q. As far as you know?

A. No. She is just the same with all of us.

Q. Barbara, did you ever know your mother to try to buy a gun?

A. No.

Q. Or did you ever hear of her discuss trying to buy a gun?

A. No.

[fol. 2157] Q. Or did you ever hear her ask anyone else to buy a gun?

A. No.

Q. Or to say that she would like to buy a gun in order to kill Jack?

A. No.

Q. Did you ever hear your mother discuss a gun at all?

A. No.

Q. Did you ever see your mother with a gun?

A. Well, she put Jack's up and that——

Q. She put it away?

A. Yes.

Q. I mean other than that you have seen her—. Of course, that brings up another point. If your mother did have access to this gun of Jack's at all times—is that correct? It was kept somewhere in the house?

A. Yes.

Q. So that it wouldn't have been necessary for her to buy a gun. She could have used that one if she wanted it?

A. Yes.

Q. Now, where was this gun kept in the house as far as you know?

A. Well, he had an army locker in there and he kept it in that lockup.

Q. Kept it in a lockup?

A. Then he would have it in his dresser drawer.

Q. Did you know he was in the habit of carrying it on his person or in his car wherever he went?

A. Yes.

Q. Did he do that?

A. Yes.

Q. Where would he usually carry it?

A. In the car pocket or under the seat.

[fol. 2158] Q. Under the seat or in the glove compartment?

A. Yes.

Q. And then when he got home he would put it in this locker box or would he just leave it in the car when he got out of the car?

A. Sometimes it would stay in the car for a couple of days, then he would take it out and put in that there army deal.

Q. Where did you see that your mother put it when she put it away?

A. In the trunk, army trunk.

Q. In the army trunk?

A. Yes.

Q. You saw your mother put it in this trunk where it was kept?

A. Yes.

Q. Do you recall, Barbara, about the last time that you saw your mother—or, at the time you saw your mother put this gun in the army trunk was in relation to her moving to Gridley?

A. Well, last time I remember of her having it was Jack had it sitting on the divan and his brother was on one side and Mom was on the other and I don't know if he knew it was loaded or not but it went off and went down through the floor.

Q. About when was that?

A. It was in June.

[fol. 2159] Q. That would be June of this last year?

A. Yes.

Q. And did your mother put it away at that time?

A. Yes.

Q. That would be then June, July, some two months before you moved to Gridley?

A. Yes.

Q. Now during that interval between this incident in which the gun was fired into the floor and you moved to Gridley was the gun so far as you know kept about the house?

A. Yes.

Q. On any occasion during that period of time did your mother ever discuss with you that particular gun?

A. No.

Q. And in particular whether or not Jack had instructed her to sell it?

A. No.

Q. Did you ever hear any discussion about selling that gun by any one?

A. No.

. . . . . .

Mr. Grinnell:

Q. Now it has been testified that your mother was a woman of violent temper, Barbara, how would you describe your mother's temper?

A. Well, she didn't have a temper. When she would get mad she wouldn't fly off the handle or nothing.

Q. How would you describe it?

A. Well, she was always crying when she would get mad.

Q. She would cry?

[fol. 2160-2161] A. Yes, something would sit down and cry.

. . . . . .

[fol. 2162] Cross examination.

By Mr. King:

Q. When did you tell me she was going to buy the gun?

A. It was before she met Jack, but that Saturday she told me she wasn't buying one.

Q. Oh, she discussed buying a gun with you that day?

[fol. 2163-2167] A. She told me she wasn't going to, that is all she said.

Q. And you knew she had gone down here to one of these little stores here to try to buy a gun?

A. That was what I heard from another person, but I didn't hear her say it.

Q. But she told you that Saturday she wasn't going to buy a gun?

A. Yes.

. . . . . .

[fol. 2168] Q. Welfare was quite a bone of contention in your family, wasn't it?

A. Yes.

Q. And caused a lot of these moving out and in we have heard about here when your mother would move over to

Palermo and back to—over to Thermalito and back to Palermo, is that right?

A. Well, Jack would get—they would have an argument [fol. 2169-2172] and he would tell us to move and we would move.

. . . . . .

Q. Did you ever see your mother pay Jack any rent?
A. Yes.
Q. How much?
A. $60 a month.

. . . . . .

[fol. 2173] Q. Now do you remember telling, in the presence of Johnny Atkins, telling Jack that your mother [fol. 2174] was going out with somebody else?

A. No, I never talked to Johnny in front of Jack.

Q. Well, you remember telling Jack in the presence of Johnny?

A. No.
Q. You didn't make that statement?
A. No, I didn't.
Q. That was just a short time before this occurrence?
A. No.

. . . . . .

[fols. 2175-2219] Q. But after she married him you say she didn't go out with any other man?

A. No, she didn't.

Q. Do you know who the man was she was with the Saturday night?

A. What Saturday night?
Q. After the dance, after she left you at home and——
A. (Int.) She wasn't with no man.
Q. Are you sure of that?
A. I am sure, not while she was with me she wasn't.
Q. But I mean afterwards?
A. No.

Q. When she took the Wagners back over to Oroville who was the man that drove back to the house with her?

A. I wouldn't know.

. . . . . .

Mr. King: Thank you, Your Honor. (questioning witness) You know then who she might have been with after she took the Wagners home?

A. No, because I didn't see her talk to any one or make any arrangements or nothing.

* * * * * * *

[fol. 2220] DAVID Q. BURD, called as a witness by the plaintiff in rebuttal, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Mulkey:

Q. Mr. Burd, I had forwarded down to your office in Sacramento yesterday this envelope. Did you receive these items?

A. Yes.

Q. Would you examine them and see if you received all the items in there?

A. Yes (looking in envelope).

Q. Did you examine those pieces of cloth that are in that white envelope?

A. I did.

Q. Now, heretofore, and before you initially testified in this proceeding, you and Mr. Gilmore performed certain tests to identify powder patterns, is that correct?

A. That is correct.

Q. And those tests were made with this piece and from shells that were furnished to you by us, is that right?

A. That is correct. With one exception. There is one shell used that was not. But it was the same type.

Q. Do you recall what shot that was on?

A. Yes.

* * * * * * *

[fol. 2221] The Court: I assume he will. Mr. Mulkey, while Mr. King is looking at that you might identify for the record the things that you just brought back to Mr. Burd.

Mr. Mulkey: I was referring to People's Exhibit No. "1".

The Court: Then you mentioned some cloth.

Mr. Mulkey: A gun. And I was referring to People's Exhibits "37-A, B and C", three pieces of blue cloth. And finally I was referring to People's Exhibit "29" a cartridge case containing seven cartridges.

. . . . . .

Mr. Mulkey:

Q. Can you identify this cloth for me, Mr. Burd?

A. Yes, I can.

[fols. 2222-2228] Q. What is that?

A. That's a piece of cloth into which we fired tests using the automatic pistol that is Exhibit No. "1".

Q. And using the shells furnished you with the exception of one. Will you tell us which shot was made with that?

A. That was the one that was marked four feet.

Q. This was made with a shell that was not furnished you by our sheriff's office?

A. That is correct. It was the same type of shell, I might add, but it was not one of those.

Q. Super-X long .22 I think they are described as?

A. Yes. Long rifle.

Q. Now, would you stand up here, Mr. Burd, and perhaps I can tilt this a little bit. Would you stand perhaps on this side and I will hold the other end over on the other side. You stand right here so you can point out some things and not be in the way. Will you point out to the jury what is represented on this——

Mr. King: I can't see, Mr. Burd. If you will stand a little bit to the side.

The Witness: The tests were fired in the People's Exhibit No. "1" holding the muzzle of that pistol at various distances from this piece of cloth. Up here actually I have got two feet, or "2" with a line, which is two feet, the muzzle held here and two feet from the cloth.

. . . . . .

[fol. 2229] Direct examination. (Resumed)

By Mr. Mulkey:

Q. Now, will you explain to the jury as regards your tests of the markings on this cloth just introduced into evidence?

A. Starting from the upper left corner, the muzzle of the pistol, People's Exhibit No. "1," was held at a distance of two feet from the cloth when a cartridge was fired, and the bullet penetrated the cloth into a piece of [fol. 2230] cardboard, into a cotton filled box. The next hole was made with the muzzle of the gun held at a distance of one foot. The next one at a distance of three inches. The next one at a distance of three feet. Down on the lower left corner there is one at 18 inches. The lower right hand corner is one at four feet.

Q. And each one of these have been marked "3 inches" or "3 feet" beside them in their general area?

A. That is correct.

Q. Now, as we heretofore mentioned, you received yesterday this Exhibit "37-A-B and C", People's Exhibit, and you were asked, were you not, to examine these for what I believe you have heretofore referred to on your examination as unburned powder particles and this word lamellae, which was introduced by Mr. King prefacing his remarks regarding your examination. May I ask you if "lamellae" refers to what we know as unburned powder particles? Is that it?

A. Well, frankly I haven't heard that word used in that manner before. Certainly lamellae is a thin platelet and could apply to many types of gunpowder. Not to all types but to some types such as the type in this particular ammunition that was involved in this case and is represented in People's Exhibit No. "29".

[fol. 2231] Q. Perhaps I could put it this way, Mr. Burd, the evidence that may exist or not exist around an entrance of a bullet into cloth of any type, excluding whatever marks a bullet may leave of itself as it goes through the cloth, there are certain things around or whose presence may not be around a hole in the cloth that will give some indication of distance, are there not?

A. Many different things may be present and they are

not always all present and sometimes some are present and sometimes others are present, it depends on the ammunition and the weapon.

Q. Considering this ammunition and this weapon, if there was anything present they would be called unburned powder particles I take it?

A. Well, we may find unburned powder particles, we may find partially burned powder particles or the affect of hot particles or gases or flashes where it touched the cloth or we may find particles of bullets or debris in the barrel of a weapon, we may find smoke deposits and we may find in some type of ammunition grease and microscopic particles of glass which are present in most 22 primers, that depends on the distance of the weapon, how far in each case.

Q. Considering your test, Mr. Burd, with this white piece of cloth introduced in evidence, taking perhaps this 18 inch hole, are there little black dots around here or what would they be?

A. There are a number of particles, a few of which show up as black dots which are partially burned gun-
[fol. 2232] powder particles they are grains or platelets and they are also present but not visible to the naked eye many unburned powder grains which have a light—in this particular c e a light yellowish appearance and are platelets in shape.

Q. Considering that type of matter as is present on this test you made at 18 inches with your cloth, comparing that type of matter, did you examine this 37-A, B and C these three pieces of blue cloth to determine if that type of matter was present or absent around the various holes delineated upon that blue cloth?

A. Yes, I did.

Q. And referring now specifically to People's Exhibit 37-C, which has three holes on it, labeled 24, 36 and 48, did you examine the 36, the one delineated as 36?

A. I did.

Q. Can you tell me what you found or tell the jury?

A. I found a hole in the fabric. I found a darkened area around the hole, and annulus ring or deposit of various materials immediately around the hole and a number of small particles, unburned gunpowder residue or platelets or lamellae deposited on the cloth. They are

not visible to the eye, they are plainly visible under low power magnification and stereoscopic microscopy.

Q. Could you turn your chair around a little bit, Mr. Burd, let us assume here we will make a little line down here—what do you call the end of the gun, the barrel?

A. Muzzle or barrel.

Q. End of the muzzle?

[fol. 2233] A. The muzzle would be the end.

Q. The muzzle, would that be the last place a bullet would leave?

A. End of barrel, end of the muzzle is the end of the barrel.

. . . . . .

Mr. Mulkey: Now, Mr. Burd, as you have stated, some [fol. 2234] of these particles that you see at 36 inches would not be visible to the naked eye, you have to discover them microscopically, is that right?

A. That is right, they are very small particles, the only time you can see them, if they are dark they show up better on white cloth, on this cloth they show more plainly than on the blue cloth but under the microscope you can see them equally well.

. . . . . .

[fol. 2235] The Witness: In both cases, I fired a test at 2 feet and one at 3 feet. I examined them under the microscope and for a distance of about 2 inches around the hole I found a few particles of unburned powder residue at 36 inches, and a number more at 24. At 24 they were much more readily observable and there were more of them. There wasn't a large number in either case, there might have been 7 or 8 detectable at 36 and I don't know how many at 24 inches. I didn't count them, there were more.

Q. One more thing, Mr. Burd, what about 18 inches?

A. At 18 inches there were still more, I mean as we got closer more of the deposits was present.

Q. I am calling your attention particularly to People's Exhibit 37-C, this blue piece of cloth delineated at 24, 36, and 48 and referring to the 24, 36 results as you exam-

ined the blue cloth, was there a material difference between that and what you found on your own test in the white cloth?

A. No, there was a slight difference, of course the particles weren't in the same spot and there were undoubtedly [fol. 2236] a slight difference in the number, they will vary by a few particles on any test fired.

Q. Concerning the rough area covered and the relative density of the particles was there a large difference in number?

A. There was not.

Q. Now you also examined the garment in this matter—I will go on to another subject for a moment, Your Honor, or Mr. Burd. At 48 inches in both your tests and in the matter you examined by Doctor Caffaratti, did you find any of the particles we refer to?

A. I found none in the doctor's test which was marked 48 inches and on my own as I recall, there were none, I will have to check that here. There were either none or I would say may be one or two, I don't think there were any to the best of my recollection.

Q. Now you examined People's Exhibit 5, this blue dress, did you not?

A. Yes, I did.

. . . . . .

[fol. 2237] Mr. Mulkey:

Q. You did examine this dress?

A. Yes, I did.

. . . . . .

Mr. Mulkey:

Q. What did you arrive at as to an estimate as to the distance on the hole in that dress?

A. I testified my best estimate was between two feet and four feet, certainly not greater than four feet, I think it was materially less than four feet, but it wasn't closer than two feet, and certainly not as close as 18 inches.

Q. Now may I ask you this considering your examination of the dress, your examination of these tests, your [fols. 2238-2240] examination of the gun, ammunition, and

your general background, would it be possible, sir, for me to take that gun, hold it back at this line, the end of the barrel (indicating on blackboard) firing into a point any place over 18 inches and up to 36 inches and not leave some of these lamellae or powder particles you have referred to, sir, in the garment considering a garment of such as we have dealt with in these tests you have conducted.

A. And considering this weapon and this ammunition?

Q. Yes.

A. No.

. . . . . .

[fol. 2241] Q. Now I am not certain, Mr. Burd, but it has been indicated that on your direct examination you referred to an automatic revolver, whether you did or not on your direct examination you have on occasion referred to a piece such as this as an automatic revolver, haven't you?

A. I may have accidently, actually it is not an automatic revolver within the technical terminology.

Q. What do we call this firearms identification work?

A. Yes.

Q. However, I want you to look right along the side of that piece and read what it says there?

A. Ruger 22 Cal. long rifle automatic pistol.

Q. In common parlance a piece such as this may be referred to as an automatic even though technically it is known as a self loading piece.

A. Actually it isn't an automatic, that is what they are called by the manufacturers, by the people who sell and use them, however, it is a self loading weapon, self loading pistol. You can describe a thing technically if you wish by [fol. 2242] calling this little flashlight in my pocket a flashlight but I could describe it as a battery operated illuminating device and both are true answers, but we call it a flashlight. That we call normally an automatic pistol, it is not capable of full automatic firing such as a sub-machine gun.

. . . . . .

[fol. 2243] Mr. Mulkey: Is there anything in that exhibit that you have in your hand which would indicate that none

of the holes on the dress could have been fired from such distance?

A. Yes.

Q. What is it, sir?

[fol. 2244] A. There are several things in every case—that is the two holes which are marked 2, 4 and 6?

Q. Yes.

A. Each of them have fairly extensive smoke deposits as differentiated from unburned powder grains which are also present. In addition at the distance of 2 and 4 inches there is obvious burning of the fibers, that is hot gases and hot gunpowder residue have contacted the fibers while still hot enough to actually burn the fibers, they are plainly visible even under low power magnifying glass, you can see the burned fibers, there are no such burned fibers present on the dress around any of the holes. In addition there is at distances of 2 and 4 inches at least on this particular series of tests, there is a definite tearing and blasting effect on the fabric which is not present or was not present around any of the holes on the dress at the time I examined it.

. . . . . .

[fol. 2245] Mr. Mulkey: I am going to say it again, Mr. King. (Questioning witness) Assuming a gun of this kind, shells of this kind, a person wearing a dress of this type, would you expect to find enlarging of the hole in a body in any case other than where the gun was placed in contact with the body when the shell were exploded?

. . . . . .

[fol. 2246] The Witness: Generally my answer would be "No" if the muzzle of the weapon were in contact with the garment and if the garment was placed against the skin the hot gases expanding naturally in the barrel, gun powder residue, gases and so forth would follow the bullet into the wound and of course open up the wound and sometimes produce a very large wound. At a distance of about a quarter of an inch we still might have some gases following in but certainly over one inch the pressure of the gases would not be sufficient to force that material into the wound, there would be unburned powder residue, deposits of various

types, smoke and the charring action of the expanded gases on the flesh and on the garment covering the flesh that would be very apparent, I mean it could hardly be missed, it is so obvious when it occurs, but at any greater distance and I think even an inch is a little extreme in a case [fol. 2247] of a 22.

* * * * * * *

Mr. Mulkey: Now referring to this hole on People's Exhibit 5 which is a hole over the left portion of the front of the dress that you have heretofore testified to as an entrance hole, considering the distance that this gun with this type of ammunition, considering the distance that this gun with this type of ammunition would have to be from the dress to produce the physical results you observed when you examined that hole, do you have an estimate of the distance that that gun and shell would have been held from that hole, when the shot was fired?

A. My estimate remains exactly the same, I would say between 2 and 4 feet, probably closer to 2 feet than 4 feet, most likely between 2 and 3 feet.

Q. Considering your examination referring to the same hole could the gun have been held exactly 18 inches and produced what you saw on that dress?

A. I think that is impossible.

Q. Thank you, sir.

A. Because at 18 inches there would be considerable more gun powder residue than is present on the dress.

Q. Further, as you indicated on People's Exhibit 37-A, if a gun was fired 2, 4 or 6 inches from the dress it would [fol. 2248] have the burned appearance that these holes have, is that right?

A. The smoke would be obvious on the garment, there would be burning of individual fibers, I wouldn't say threads would be burned, but individual fibers would be burned, there would be the little charred and burned spots which are not present and we do not have the so-called blast effect. The hole is a little bit, looks like it is stretched out of shape and I know it has been tampered with slightly in the laboratory, we were making our examinations, but it is minor. It is a little larger than some of the other holes.

Q. You brought up a subject there, on this laboratory

work you done with this dress you were associated with Mr. Gilmore in testing this dress, were you not, sir?

A. At all times.

Q. At all times when this dress was tested?

A. I wasn't watching everything he did but was there and observed most of it.

Q. Do you know of your own knowledge whether any solvent was ever used on this dress?

A. None whatsoever.

Q. And if you wanted to determine what these particles you were finding on this dress were, would you pour a solvent on the dress to get the particles?

A. I certainly would not.

Q. How would you determine what the particles were?

A. There are a number of ways, in this particular case we removed some individual particles with a pair of very [fol. 2249] fine sharply pointed tweezers and put them in a chemical re-agent. We also removed and clipped out a few fibers and in one case most of one thread and tested that separately from the dress. There is another method with photographic films that is commonly used in such cases and that re-agent is applied to the film which is placed over the stained area, a hot iron is then applied to the back, under the iron is some acetic acid solution which transfers the nitrate and nitrite ion which made the present in the fabric to the photographic paper and then chemically we determine the particular particle. That is not used very often and of course when it is used it is very obvious, you can see the mark left by it and you can smell the effects of the acetic acid, like very strong vinegar on the garment.

Q. Now, Mr. Burd, I show you here the reversed side or the back or the zipper side of People's Exhibit 5 and you will note as the back of that dress is facing you, as I take it it would be worn that on my left there is a hole with a few dark brown spots around it and then a rather large discolored area there, do you recognize that?

A. Yes.

Q. Was that on there when you initially received the dress for analysis?

A. It was.

Q. And do you have an opinion as to what that is, sir?

A. Yes, I don't know, I mean I did not conduct tests, but I have seen such patterns in many cases.

Q. Of bullet wounds?

A. Yes.

[fol. 2250] Q. What?

A. It is very commonly produced either by blood serum, that is clear serum from the blood without the red cells which exudes from some wound after death, after circulation stops, a little of the serum leaks out, sometimes on fatty people, particularly we get some fatty tissue that will decompose in a relatively short time and we find deposits on the dress. Now I didn't test this, I don't know just what it is, but it has that appearance and it is right around the bullet hole.

Q. But you do know it is not a re-agent that was applied in the office of Criminal Investigation?

A. That is right, it is the same thing as around the holes under the arm.

Q. That would be the same material?

A. It appears to be, yes.

* * * * * * *

[fols. 2251-2260] Cross-examination.

By Mr. King:

* * * * * * *

[fol. 2261-2264] Q. On your direct or cross examination —I don't recall you testifying here about the gun being a gun that where you had to pull the trigger each time to make the thing go off. You didn't testify about that on the first—in the first instance, did you?

A. No. You have to pull the trigger to make the gun fire. You do on this particular weapon, yes.

Q. You didn't testify anything about that on direct?

A. I don't recall, no. I don't believe I did.

Q. But it is a fact that that trigger has to be pulled each time?

A. That is correct.

[fol. 2265-2268] Q. Thank you very much. There is no difference of opinion on that. Talking about smokeless powder, you say that a hole within two or four inches of the muzzle of a gun on this goods that we have been talking about would show some burning?

A. I said it did in this case, this ammunition in this weapon.

Q. And you can see from Dr. Caffaratti's piece here that between two and four inches that on the piece marked two inches there is some explosion of the fabric, of the goods there, isn't there?

A. That's right.

Q. Would you say there is burning there?

A. Yes. There is actually burned fibers at two, four and twelve inches. There are a few at twelve inches. There are none at eight and none at ten.

Q. None at eight and none at ten?

A. That's not consistent. It sometimes happens one particle will happen to burn or two particles will burn at ten. There was none at eight and none at six.

* * * * * * * *

[fol. 2269-2301] Miss Donna Jean Ferris, a witness called on behalf of the People in Rebuttal being first duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Now, Donna, I want you to keep your voice loud enough so that I can hear you back here without any trouble so that way we are sure that all the ladies and gentlemen of the jury will be able to hear what you have to say, will you do that?

A. Yes.

Q. Now your name is?

A. Donna Jean Ferris.

Q. Just a little louder please?

A. Donna Jean Ferris.

Q. And how old are you, Donna?

A. 13.

Q. And you are the younger sister of Barbara, is that correct?

A. Yes.

Q. Your mother was married to the defendant, Mr. Atchley?

A. Yes.

Q. And you recognize him at this time, do you not?
A. Yes.

. . . . . .

[fol. 2302-2307] Mr. Grinnell:

Q. When you first came over that morning to get the check where did you go?
A. I don't remember, I think we were looking for a house—well, we did, we were looking for a house.
Q. And why were you looking for a house?
A. Well, so that Jack wouldn't know where we lived.

. . . . . .

Mr. Grinnell:

Q. When you said a moment ago that you didn't want Jack to know where "We" lived you were referring I assume to your mother?
A. Well, to all of us.
Q. To all of you and did your mother state any reason why she didn't want Jack to know where she was living?
A. No, she just didn't want to be bothered with him.

. . . . . .

[fol. 2308-2327] Q. Is it true that when you moved from Palermo from the big house as we have called it, over to—yes, from Palermo from the big house as we have called it, to Thermalito you wouldn't stay very long, maybe just a short time, that is correct, isn't it?
A. Yes.
Q. And then you would move back to Palermo?
A. Yes.
Q. And how many times would you move from Palermo to Thermalito?
A. About a couple of times.
Q. What was that moving out about, did your stepfather and mother have a quarrel and you would move out or what was it all about?
A. They would have a quarrel but I don't know what about.
Q. And then your mother would move you children out there, is that right?

A. Yes.

Q. And then in a few days or a week you would move back, is that right?

A. Yes, because Jack would come up and pack us back.

* * * * * * *

[fol. 2328] MR. DONALD H. NEWELL, a witness produced on behalf of the People in rebuttal, being first duly sworn, testified as follows:

Direct examination.

* * * * * *

Mr. Grinnell:

Q. Now, Mr. Newell, by whom are you employed?

A. City of Gridley.

Q. And in what particular department?

A. Well, the utility, water and electrical.

Q. Gridley has a public utility district?

A. Yes.

* * * * * * *

[fol. 2329] Q. Now calling your attention to July 29th, that being a Tuesday, did you have occasion to go to 384 Nevada Street in the City of Gridley?

A. Yes.

* * * * * * *

[fol. 2330] Q. Now about what time of day on that Tuesday, did you go to the Atchley residence on 384 Nevada Street, we will call it.

A. It was somewhere around 4 o'clock.

Q. Somewhere around 4 o'clock, did you go with some one or alone?

A. I went alone.

Q. When you arrived there was any one there?

A. Yes.

Q. Who was there?

A. Mr. Atchley.

Q. Mr. Atchley, was Mrs. Atchley there?
A. No, she wasn't.

. . . . . .

[fol. 2331] Mr. Grinnell:

Q. Now this workmen's—it says across the top, "Workmen's Copy, Gridley Municipal Utilities, is that correct?
A. That is right.
Q. And then there is a signature down here at the bottom, is that correct, written in ink, "Kay Atchley"?
A. Yes.
Q. And then that is scratched out in pencil and Ferris is written above it, is that correct?
A. That is right.
[fol. 2332] Q. All right now, was that alteration made prior to your arrival at 384 Nevada Street that afternoon?
A. No.
Q. It was not. All right now, you told us that when you arrived there, Mr. Atchley was there but Mrs. Atchley was not?
A. That is right.
Q. Now what happened when you arrived there, if anything?
A. He asked me what name I was turning the lights on in and I told him and he said not to turn it on in that name that that was his name.
Q. Not to turn it on in his name?
A. And I said, "I will wait and she should show up and when she does I will have her sign her name on it" and I would erase his and so I waited around five or 10 minutes and I talked to the man and I said, "Well, it is about time she was showing up around here seems like" and he said, "Oh, she is driving around here". He said, "I seen her go by a time or two" and eventually he about two blocks away her driving by and I said around approximately 15 minutes and one of the city officers showed up and she pulled in behind him.
Q. So that she did not—you saw her drive by but she did not actually come up there and stop until the city officer arrived, is that correct?
A. That is right.

Q. And do you recall at this time which City Officer that was?

A. That was Tommy Tamagni.

Q. Did the officer come in his police car?

A. Yes.

Q. And Mr. Atchley was still there?

A. Yes.

[fols. 2333-2334] Q. And he parked his car?

A. Yes.

Q. And how much thereafter did Mrs. Atchley arrive?

A. Immediately behind him.

Q. She followed the police car?

A. Yes.

Q. And did she park her car?

A. Yes.

Q. What happened then when Mrs. Atchley arrived?

A. Well, she got out of her car and she said something about her owning a half interest in a car and——

Q. (Int.) Was she talking to who?

A. To Atchley.

Q. To Atchley?

A. Yes, and he said something about he wouldn't argue with her about it and she got around to saying, "Now, Jack, you kicked me out and you know you did."

Q. And then what happened?

A. Well then, I got her over to sign this work sheet.

Q. Did you tell her that Mr. Atchley had told you not to hook it up in his name?

A. Yes.

Q. And what did she say?

A. She said she would sign her own name.

Q. At that time did she sign then below that?

A. Above it, sir.

Q. Above it?

A. Yes, whatever it is there.

. . . . . .

[fol. 2335] Q. Now can you describe the de--amor or the attitude of Mr. Atchley or Mrs. Atchley or both towards each other at that time?

A. Well, they weren't getting along too well.

Q. And this was on Tuesday, the 29th of June?
A. Yes.

. . . . . .

[fols. 2336-2337] Cross examination.

By Mr. King:

Q. And she said, "You kicked me out and you know you did" and what did he reply?
A. He didn't say anything to that.

. . . . . .

[fol. 2338] Mr. Wesley Herman Tamagni, a witness produced on behalf of the People in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Your name is Tommy Tamagni?
A. Wesley Herman Tamagni.
Q. Are you referred to as Tommy?
A. Yes, sir.
Q. And you are employed by the City of Gridley, is that correct?
A. Yes, sir.
Q. As an officer?
A. Yes, sir.
Q. Were you so employed on the 29th of July, 1958?
A. I was.
Q. At any time that day did you have occasion to go to the residence at 384 Nevada Street in the City of Gridley?
A. I did.
[fol. 2339] Q. Do you recall about what time that day you went there?
A. It was about 4 p.m. in the afternoon.
Q. And who was there when you arrived?
A. Mr. Atchley and his wife and children.

Q. Now was Mrs. Atchley there prior to your arrival or after you arrived?

A. She pulled in behind me.

Q. Well, how did it happen, officer, that you went to the—that address that day?

A. I received a call on the radio that there was a family brawl going on down there.

Q. A family brawl?

A. Yes.

Q. When you got there there was no brawl?

A. No, sir.

Q. Mrs. Atchley was not there?

A. No.

Q. She pulled in behind you?

A. Yes.

Q. What happened then when you got out of your car?

A. I went up to Mrs. Atchley and asked her what the trouble was and she said that she wanted her husband to leave.

. . . . . .

The Witness: She said she wanted her husband to leave when I asked her what the trouble was, she said, just didn't want him around the place.

. . . . . .

[fols. 2340-2344] Q. And what did she say, once again now?

A. She just said she wanted him to leave, she didn't want him around the place.

Q. She didn't want him arrested?

A. No, I asked if she would sign a complaint against him and she said, "No" that she just didn't want him around, she wanted him to leave.

Q. Did you hear any conversation between Mr. Atchley and his wife at that time?

A. They never had no words between the two of them at all.

Q. They did not in your presence?

A. Right.

Q. Did you advise either one of them to do anything?

A. I advised Mr. Atchley if he had anything in the house he better get it out and leave to save a lot of trouble.

Q. And what did he tell you at that time? Did he tell you he wasn't living there?

A. No, he didn't say he was living there.

Q. And did he leave at that time or do you know?

A. I and Mrs. Atchley talked for a few minutes and then he said he had a couple of articles in the house such as blankets and I told him if he had them in there he better pick them up and leave and she said they didn't belong to him and so he finally got up and he left.

Q. And that was the end of it?

A. And she seemed to be satisfied and I also left.

. . . . . .

[fol. 2345] WILLIAM TAMAGNI, called as a witness by the People in rebuttal, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Grinnell:

Q. Will you give your name please?

[fol. 2346] A. William Tamagni.

. . . . . .

Q. Are you employed by the City of Gridley?

A. Yes, sir.

Q. As a police officer?

A. Yes.

. . . . . .

Q. Were you employed in that capacity on the 2nd and 3rd of August, 1958?

A. Yes, I was.

Q. What shift were you working and what hours were you working at that time?

A. 10:00 p.m. until 6:00 a.m.

Q. 10:00 p.m. at night until 6:00 a.m. in the morning?
A. Yes, sir.
Q. Now, do you patrol in the car or on foot?
A. Patrol in the car, sir.
Q. In the car. How do you patrol?
A. Just the general area of the town.
Q. I mean, do you just drive around or do you have any specific route that you follow or do you just drive around?
A. Just drive around.
Q. Did you drive around at all that night in the area of Magnolia and Nevada Streets where those two streets cross?
A. Yes, I did.
Q. Do you recall at this time about what time if you can [fols. 2347-2349] recall that you were in that area?
A. Well, I came down Nevada Street north at approximately 1:30 to 1:40.
Q. In the morning?
A. In the morning.
Q. And that would be on Sunday morning, is that correct?
A. Yes, sir.

• • • • • • •

Q. Did you see a car up in the next block?
A. I seen——
Q. By that I mean the block north of the intersection of Magnolia and Nevada on Nevada Street.
A. Yes, I did.

• • • • • • •

[fol. 2350] Mr. Grinnell:

Q. Was it in front of somebody's house?
A. Yes.
Q. Whose house was it?
A. Alongside of the Stickler home.
Q. Where is the Stickler home located?
A. Right on the corner of Magnolia and Nevada.

• • • • • • •

[fol. 2351] Q. Now, when you went by this car and noticed this car did you stop?

A. Yes, I did.

Q. What kind of a car was it?

A. It was a two tone green Nash, little Rambler or whatever it was. I didn't pay too much attention to the car. I never seen it before.

Q. Would you examine these two photographs which have previously been introduced in evidence as People's "8" and "9".

A. Yes, sir. This is the one.

Q. When you stopped did you get out of your car?

[fol. 2352] A. No. I didn't get out of the car.

Q. You didn't get out of your car?

A. No, sir.

Q. What did you do?

A. I checked it going down on Nevada.

Q. Which side of the street was it on?

A. On the west side.

Q. West side of Nevada?

A. Yes. They been having a lot of prowler trouble in that town and I made a U turn and came back in behind it.

Q. In which direction was the car facing?

A. It was facing north.

Q. It was facing north?

A. Yes, sir.

Q. Did you stop then?

A. Or facing south rather.

Q. It was facing south?

A. Facing south.

Q. On the west side of the street?

A. Yes.

Q. When you made your U turn and came back did you stop then?

A. Yes, I did.

Q. Then did you get out of your car?

A. No. But I took the license number down of the car.

Q. What license number did you take down?

A. AAJ 372.

Q. Would you look in the photograph and see if that license number appears in either one of those pictures?

A. Yes, it does.

Q. Then you are certain that is the car you saw?

A. Yes, sir.

Q. Did you fix the time, officer, that you observed the car [fol. 2353] there?

A. Well, we always mark the time down whenever we check anything out like that.

Q. What time did you mark down that you observed this car there?

A. 1:40.

Q. 1:40?

A. Yes, sir.

Q. What did you do thereafter?

A. When I first come in there I seen the light on the front porch of the Atchley home but I didn't know anyone lived there at the time and I stopped in front of the house.

Q. Was anyone there at that time?

A. I didn't see anyone.

Q. And then did you remain in the area or leave the area?

A. I went down and checked the car out and I checked the car coming back and I stopped in front of the Atchley home again on the way back out.

Q. No sign of activity either place?

A. No, sir.

Q. Did you see anyone around the Atchley home when you went down and checked around there?

A. No, sir.

Q. Did you look around in back or to the side of the house?

A. I looked around the side of the house, yes, sir.

Q. Did you see anyone around the side of the house?

A. No, I never.

Q. Did you see anyone walking on the street around the Atchley house that night at that time?

A. No, sir, I never.

Q. All right. And then about what time did you leave the [fols. 2354-2424] Atchley home at that time?

A. Approximately 1:45.

Q. 1:45?

A. Yes, sir.

Q. And was the car still parked up the street when you left?

A. Yes, sir, it was.

Q. Did you check it again when you left?
A. No. Just checked it twice and that was all.
Q. Then did you leave the area or what did you do?
A. I left the area and went back up on my regular routine patrol.
Q. Did you return to the area again thereafter?
A. I started to come back down to the spot where I seen the car because I knew the car didn't belong there, and the fire broke out at approximately 2:00 or 2:05 on Hazel Street and I was there at the fire.
Q. Then after the fire did you return again to the area?
A. Yes, sir. I got the call and I went back down.
Q. What time did you return that time?
A. Approximately 3:10.
Q. 3:10.
A. Yes.
Q. Were there other officers there when you arrived?
A. Yes.
Q. So you were not the first officer there?
A. No, I was not.
Q. Did you check to see if this car was still there that you had noticed earlier?
A. Yes.
Q. Was it there or not?
A. No.
Q. It was gone?
A. It was gone?

* * * * * * *

[fol. 2425] Mrs. Alice G. Anderson, a witness called on behalf of the defendant in rebuttal, being duly sworn, testified as follows:

* * * * * * *

[fol. 2426] Direct examination.

By Mr. King:

(Questioning witness) Mrs. Anderson, at one time you were a social worker here in Oroville, were you?

A. I was.

Q. And worked for the welfare department?
A. Yes.

Q. Were you acquainted with Kay Ferris and her family?
A. Yes.

Q. Are you acquainted with the defendant Jack Atchley?
A. I met him once.

Q. And on that occasion he called at your house, did he?
A. Yes.

Q. In Thermalito?
A. Yes.

. . . . . .

[fol. 2427] (Questioning witness) Did he make a declaration to you at that time when you first met him?

A. Yes.

Q. When was that, the time?
A. I don't remember the exact date but it was on a Tuesday about 5:30 or 6:00 o'clock, the Tuesday preceding the day Mrs. Atchley died.

Q. Yes, and that declaration was what?
A. He said he was married to her.

Q. Did he talk about Brenda, his child?
A. No.

Q. You don't remember that?
A. He didn't talk about that.

. . . . . .

[fol. 2428] Cross-examination.

By Mr. Grinnell:

Q. Now you say you talked to Mr. Atchley the Tuesday preceding her death. Do you recall what motivated, if you know, Mr. Atchley calling upon you—by the way, do you usually receive people in connection with your business at your home?

A. That is not usual.

Q. So that this was unusual in the fact that someone came [fol. 2429] to your home, is that correct?

A. Yes.

. . . . . .

Mr. Grinnell:

Q. Well, he told you something. Would you tell us as nearly as you can at this time what that was?

A. We talked for about an hour or an hour and a half. I can not remember everything he said.

Q. Did you know at that time that his wife had moved to Gridley?

A. No.

Q. Did you know she was going to move to Gridley?

A. No. He told me that evening that she had moved that day to Gridley.

Q. So that then if we can place this conversation, then it took place at sometime following her moving to Gridley, by his statement?

A. Yes.

. . . . . .

[fol. 2430] Q. What do you remember, Mrs. Anderson?

A. He told me that he had been married in December in Georgia to Mrs. Ferris. He told me that that day he had moved her to Gridley. He told me that he had understood her social worker had told her that she should have nothing to do with him.

Q. And you were the social worker at that time?

A. I had been the social worker. I was not at that time.

Q. For how long had you been Mrs. Ferris' social worker or Mrs. Atchley's rather?

A. I don't remember exactly how long. I would say it was over a year.

Q. Over a year, and during any of that period of time up until that Tuesday that they had moved to Gridley did he come to you tell you anything about their relationship?

A. No. I had not met Mr. Atchley before that time.

. . . . . .

[fol. 2431] Mr. Grinnell: But you did not know that she and Mr. Atchley were married prior to this declaration of his, is that right?

A. I did not know, no.

Q. Now, you say you talked to him about an hour and a half and you started to tell us some of the things you discussed. Can you recall other things besides his marrying her in Georgia and moving to Gridley and that some social worker according to him had possibly told her to do that, or in her association with him, I think you said?

A. Yes. He also told me that he felt that he would like to have her come back to Palermo to live in his home.

Q. Anything else?

A. Well, he told me that he had some problems because he had not been accepted as her husband and because the children did not know him as their stepfather and he was not permitted to be acknowledged in the home as the parent.

Q. Anything else?

A. Well, he told me that he had registered the car which [fol. 2432] he had purchased in his name and her name and I don't remember any other thing.

Q. Did he say anything about desiring to get her aid cut off?

A. I don't remember that he said that.

Q. Did he say anything to the effect that he wanted to get even with her for moving away from there?

A. No.

Q. Did you draw that inference from anything that he said?

A. Well, I may have had my own ideas of why he came there but that would be just my own ideas.

Q. From what he said?

A. From what he said.

Q. And what idea did you draw from what he said as to why he had come there?

A. Well, I felt that he was really hurt and angry that she had left the home. I felt that he thought I had been instrumental in forcing her to make this decision and I felt that he may have been angry enough at this time to feel that he would want to tell me about the marriage which would be harmful to her.

Q. Did you feel then from anything that he told you that as a result of his disclosure to you that it would harm her in any way?

A. Well, I felt that, that he perhaps thought that this might cause her to have the income reduced which she had and thereby probably force her to help to make a reconciliation with her.

Q. In other words, if he could get this money stopped or cut down or cut out altogether or at least cut down that there would be some leverage there to force reconciliation?

A. Well, that was what I felt now.

. . . . . .

[fol. 2433] Q. And did this fact that she was getting apparently assistance, because she was married to him, that she wasn't entitled to, was that of any interest to you?

A. Only so much as I am interested in anything that concerns the welfare department.

[fol. 2434] Q. And did you report that to anyone?

A. Yes.

Q. And who did you report that to?

A. I reported it to the worker at that time who was handling her case.

Q. And who was that?

A. That was Mrs. Steadman.

Q. Mrs. Steadman. And in addition to that did you also advise Mr. Atchley to go and see Mrs. Steadman? Is that Mrs. Agnes Steadman?

A. Yes.

Q. Agnes Steadman.

A. I suggested that when he first came to my house.

Q. And that would be for the purpose of reporting that he was married to this lady who was receiving aid?

A. Well, I didn't know what he was going to report when he came to my home and asked to talk to me.

Q. Had you been her worker at that time and Mr. Atchley had reported to you that he was married to her you would have yourself taken steps to cut off her assistance, would you not, had you been her worker at that time?

A. I would have taken steps to have made a decision

as to whether or not these facts that he gave me would true and if true then there would be action taken.

Q. And so because you yourself were no longer the worker you referred him to, and called yourself personally, Agnes Steadman, who was the person in your department who could take the action which should have been taken if any action were warranted?

A. I reported it to her so that she could take any action that was warranted.

. . . . . .

[fols. 2435-2438] Redirect examination.

By Mr. King:

Q. Mrs. Anderson, in that conversation that you had with Mr. Atchley out at your residence did you get the idea that he would like to have Kay come back to his home in Palermo, is that the idea?

A. Yes. I told him towards the end of our interview that that was what I felt he was trying to tell me and he said that I was right.

. . . . . .

[fol. 2439] Mr. Ray J. Travers, a witness previously duly sworn called on behalf of the defendant on rebuttal, testified as follows:

Direct examination.

By Mr. King:

Q. Sit down, Mr. Travers, you have been sworn. Now, Mr. Travers, I want to ask you just a couple of questions. I want to ask you first of all, did you have a conversation with Kay and Jack regarding their used car business at any time during the last days of the month of July, prior to this August 3rd shooting in Gridley?

A. Yes, I did.

Q. Would you tell the jury about what that was about and where it was and what time it was?

Mr. Grinnell: The last days of July?

Mr. King:

Q. Sometime during the last days of July, 1958 and/or the early part of August, we will fix the date, can you fix the date when you had a conversation with them?'

A. I wish I could see a calendar.

Q. There is one right up here.

A. It was approximately July 30th, on a Wednesday and July 31st, on a Thursday.

Q. It might have been either one of those two days?

A. Either one of those two days.

Q. The 30th a Wednesday and the 31st a Thursday, where did you see those people?

A. Well, they came into the office and Jack was inquiring [fol. 2440] about a bond because he wanted to go back into the used car business and as I understood it from Jack there was a certain technicality involved and until that was cleared through the state he couldn't get the bond but he was expecting it any day and he wanted to see about obtaining a bond, I believe the bond was for $5,000.

Q. He was going to buy that bond and you were going to help him get it, is that right?

A. That is right.

Q. And did he tell you where he was going into business?

A. In Oroville, the Oroville area if I recall right.

Q. You knew he had been in business in Palermo at his house?

A. Yes.

Q. And do you know whether or not he was to be in business there or somewhere else or did he tell you?

A. No, my only knowledge was around the Oroville area.

Q. What did Kay have to say that day concerning that bond and the business, if you will please.

A. Oh, she was interested and she was asking questions about it, I mean about the bond and Jack was doing most of the talking about it naturally.

Q. But were they quarreling?

A. Oh, no, absolutely not.

Q. And did you make an appointment with them for any further conversation regarding a bond?

A. Yes, and that was the next day, would either be the —that was on a Saturday, I would like to fix my dates a little different here. It was on the 29th I am almost positive, on the 29th day of July because I seen Mr. and Mrs. Atchley in their residence the very next day on the 30th at which time we again talked about the bond and also on [fol. 2441] the life insurance.

Q. And when they discussed the bond did they tell you when they intended—I will withdraw that. When did they make another appointment if they did, with you, that was my other query.

A. Not exactly with me, it was I believe the next day after I contacted Mr. and Mrs. Atchley at their residence that Jack came to the office again and saw one of the agents, I can't recall, one of the other agents and wanted to make another appointment with me regarding the bond, but I was not there.

Q. And what was that appointment?

A. That was regarding the bond again.

Q. And when was the appointment to be?

A. Well, I was suppose to recontact Jack and again I went out on Saturday and I couldn't find him, I talked to some neighbors and they said he wasn't around and that Mrs. Atchley had moved somewhere in Gridley is exactly the words they used, it was the people that moved into the house they had just left.

Q. But when they came there to the office it was apparent, was it not from their conversation they were going back into business?

A. Yes, there was no doubt about it in my mind.

Mr. King: Thank you.

Cross-examination

By Mr. Mulkey:

Q. Are you certain of the time on this, Mr. Travers? I mean, as far as July 29th and 30th or something of that. [fol. 2442] A. As well as I can fix it in my mind it was on the 29th due to the fact that I contacted them on the 30th and on Thursday Jack came into my office and I was

not there and I recontacted again that Saturday, I tried to locate him but found they had moved.

Q. You didn't see him on Saturday?

A. No, I did not, nor did I see him on the day he came into my office again.

Q. About the bond, that would be Friday?

A. I believe it would be on Thursday, on the 31st.

Q. You didn't see him Saturday, Friday or Thursday?

A. No.

Q. And you saw him then on Tuesday the 31st?

A. That is right, no, wait a minute, let me see, no Thursday the 31st is when I believe Jack came back to the office.

Q. Is that a Thursday?

A. Yes.

Q. You saw Jack on Thursday, the 31st?

A. No, I saw Jack, as close as I can recall there was a lapse of time, two or three days in there before I tried to recontact Jack. That was on Wednesday or Thursday the 31st Jack came into our office, I can't remember the time but he contacted one of the agents and stated to him that he wanted to see me about a bond.

Q. As I understand one of your other agents advised you on that?

A. Yes.

Q. You don't know that he was there?

[fol. 2443] A. No, I do not.

Mr. King: I would like to have the reporter read that back.

The Court: You may read it back.

(Reporter does as requested:)

Mr. Mulkey:

Q. Then you saw Jack when, the last time?

A. The last time I saw Jack was on Tuesday, on August the 5th.

Q. With reference to this bond conversation and prior to the time his wife was shot, when did you see Jack last?

A. July 30th.

Q. That would have been on Wednesday, is that right?

A. As close as I can recall.

Q. Could it have been a week earlier than that, on the Wednesday?

A. No, it was just before the week, the week before this all occurred.

Q. This occurred as you say, this visit was on the Wednesday and the following Saturday night his wife was shot and killed?

A. That is just how close it was.

Q. And you say his wife was with him on that day, sir?

A. Yes, when they came into the office was when I inquired about life insurance and she was very interested, also at the time, Jack was telling me about the bond to go back into business.

Q. Did they buy some life insurance from you then?

A. No, that was the following day, I made the appointment that day, they came into the office and Jack was in-
[fol. 2444] quiring about his wife being put on his automobile policy, at the same time he mentioned the bond and then I in the due course of covering the subject life insurance was brought into the conversation and she was very much concerned with life insurance on her children and so I made an appointment for the next morning at which time I contacted both Jack and Mrs. Atchley at their residence in Palermo.

Q. On Thursday, the 31st?

A. That would be on a Wednesday, I am referring to on the 30th I believe.

Q. You say you saw them in your office on the 30th and then you saw them at their home on the 31st?

A. On the 29th as close as I can recall and then Wednesday the 30th I contacted them at their residence in Palermo and then on the 31st Jack came into my office, that was on a Thursday, came to my office and I was not there.

Q. You say you contacted them at their residence in Palermo on Wednesday?

A. To the best of my knowledge it was Wednesday.

Q. Well now.

A. It could have been.

Q. Did you go in the house there and see them out at the residence?

A. Yes.

Q. If I advised you they moved the furniture on Tuesday over to Gridley for Mrs. Atchley to move to Gridley will that perhaps revise your estimate on when you visited them out at Gridley. Was any of the furniture gone?

A. No.

Mr. King: The furniture was not moved out of the [fol. 2445] big house, if the Court please, it is a misstatement of what the witness said.

Mr. Mulkey: Do you want to make an objection?

Mr. King: I do object on that ground.

The Court: The objection is substained, it is not proper cross examination.

Mr. Mulkey:

Q. Was there any of the furniture gone when you were in the house there?

A. Well, that is the first time I had ever been inside his residence, there was furniture in the house.

Q. What was in the house?

A. Oh, couch, stove, end tables.

Q. Just normal full furniture, is that right?

A. That is right.

Q. And this is on Tuesday preceeding the Saturday night that Mrs. Atchley met her death?

A. To the best of my knowledge.

Q. Well, you say, you keep saying, "To the best of my knowledge" and that is why I am trying to get at this time, if it could have been earlier, in all fairness I would like you to consider the calendar and consider the time and tell us if it could have been earlier and if so how much?

A. I doubt very much if it was in the week starting from the 21st of July and ending on the 26th of July.

Q. Could it have been, however?

A. It could have been, yes.

Q. I see, all right, now this insurance that was discussed [fol. 2446] at whatever time that it was, what was that insurance discussion about?

Mr. King: Just a moment, if the Court please, I talked to this man about a bond, the purchase of a bond on my rebuttal and now counsel wants to go into some insurance which I didn't discuss with the witness. It is improper I submit, and I object.

Mr. Mulkey: I submit on direct examination he said the conversation was about insurance and the bond, now I want to know what the conversation related to regarding the insurance.

The Court: I think that is true, Mr. King.

Mr. King: That wasn't the way I heard it.

Mr. Mulkey:

Q. What was the conversation about what kind of insurance to Mr. and Mrs. Atchley?

A. Well, first of all it was regarding the automobile policy and Jack was wondering if his wife would be covered under the automobile policy.

Q. Covered for what?

A. To drive the car that was insured and I said, "Yes" absolutely she was covered" and then the query came up regarding the bond, Jack was very much interested about the bond and he asked me if I could handle it for him and I said, "Yes" that I could and the next thing that was brought up was life insurance.

Q. Now what was that about?

A. That was for the children, she was concerned primarily with the children.

Q. Was that policy taken out?

A. Yes, it was.

[fol. 2447] Q. On her life?

A. On her life.

Q. And when was that taken out now, about either a few days before or the week before she was killed, is that right?

A. I haven't got my records here, I would have to——

Q. That was the policy on her life giving certain benefits to her children?

A. That is right.

Q. And that was taken out either a few days before as you said on the 30th or it could have been possibly the the week before that and Jack Atchley was present when this conversation took place, is that right?

A. That is right, at all times.

Q. Could you check with your office and find out exactly or let me ask you this first, could you find out when that policy was issued from your records and if you knew that

would that refresh your memory sufficiently on the time of these visits to be definite about them?

A. Yes, that information is all in Berkeley, California.

Q. You don't have any record here?

A. Not in my files, that was all submitted to Berkeley the underwriters.

Q. Could you call the underwriters in Berkeley and determine when that policy was issued by you here to insure Mrs. Ferris' life?

A. Yes.

Q. They did buy the insurance then, did they ever buy the bond, did Mr. Atchley ever buy the bond that he discussed with you?

A. No.

Q. And it was Mrs. Ferris who wanted the insurance [fol. 2448] on her life for the children, is that right?

A. Mrs. Atchley.

Q. Or Mrs. Atchley?

A. Yes.

Q. And this is all done in the presence of the defendant Jack Atchley?

A. Yes, it was.

Q. Rather than delay any proceeding on making that call you can be certain it was either within that week before or else the immediate week, days preceeding the Saturday she died?

A. That is right.

Q. Is that right?

A. Yes.

Mr. Mulkey: That is all.

Redirect examination

By Mr. King:

Q. And your memory is that Mrs. Atchley asked about the policy, this life insurance policy?

A. Oh, yes, it was strictly Mrs. Atchley.

Q. And I take it from what you have said that you brought up life insurance to him, did you?

A. I brought up life insurance to Mrs. Atchley.

Q. And you do sell life insurance?

A. Yes, I do.

Q. And you are anxious to sell life insurance on a proper risk I take it?

A. That is right.

Q. And it was for the benefit for the children, the policy?

A. The entire policy was for the benefit of the children, they were the primary beneficiaries in the policy.

Q. Yes, you testified to that on your direct examination, I remember asking you that question.

A. Yes.

[fol. 2449] Q. Here a couple of weeks ago?

A. Yes.

Mr. King: That is all.

The Court: Any further questions?

Recross examination.

By Mr. Mulkey:

Yes. (Questioning witness) However, when you spoke to Jack in the jail there he did advise you that he was suppose to have the say so over this money, did he not, or indicated that to you?

A. Oh, well, that would actually have to be decided, I could never make a statement like that.

Q. Did he make that statement?

A. He was concerned with one child mostly and that was Brenda.

Q. He wanted to know if he had the say so over that money concerning that child?

A. Well, each child.

Q. I just want to call your attention to one thing, Mr. Travers, in that statement you had with Mr. Atchley, which was tape recorded.

A. Yes.

Q. I am just going to read you here a few sentences and ask you if you don't recall it being said at that time?

A. All right.

Q. And I have just exhibited this to counsel, Your Honor, All right, almost at the beginning of your conversation with him that was tape recorded you asked the question, "And her last name was what? Ans. I forget what her last name is any how she didn't want to have the child with [fol. 2450] them down there or no say so over it, I was sup-

pose to have the say so over the money. Ques. Of the life insurance? Ans. Yes. Ques. That is still in the underwriting department, Jack, that money, and you have the binder. Now you have got the binder that was named Marcella? Ans. No, she had it in her billfold." Now that was what you asked and he answered, in that tape recording?

A. I don't know exactly the law on that, actually he would be the father of the five children.

Q. We understand it, sir, but all I am saying this is the questions you asked him at that time and those were his answers?

A. Yes, that is right.

Mr. Mulkey: That all.

Redirect examination.

By Mr. King:

Q. But you did have a conversation that morning concerning this very point, didn't you?

A. Oh, yes, I did.

Q. You discussed all of those matters with him that morning?

A. Yes.

Q. And you had talked to him at that time about that policy, that morning, didn't you?

A. Yes.

Q. And you brought up the fact of the policy to him that morning, didn't you?

A. Oh, yes.

Q. And discussed it with him?

A. Yes, I did.

Q. And it was your suggestion that he gave you some facts about the policy, wasn't it?

A. That is right, more pertinent facts regarding the [fols. 2451-2453] children.

Q. In other words he wasn't aware at that was he, that, just what the kids would get or anything of the kind, was he?

A. Well, I had informed both Mr. and Mrs. Atchley at the time the policy was, the application was taken regarding how the money would be dispersed should anything

happen to Mrs. Atchley; I mean he was aware of the general situation, what I mean by general situation naturally there would be proceedings in Court involved due to the father's of the various children.

Q. You told him there had to be a guardian appointed and all of that business?

A. Yes.

Q. You went into that in his presence and her presence, right?

A. Yes.

Q. And that the Court took care of all of the money for the children, you went into that with him?

A. Yes, the life insurance policy was made out so that the children would receive a certain amount of money, each of the five children and the dispersement of that money would be up to the wards of the children, if Jack was not there.

Q. In other words the Court would have control of the trusties purse?

A. Yes, the checks are made directly to the children by the life insurance.

Q. But of course you know and everybody knows——

Mr. Grinnell: (Int.) Just a moment, I will object to what you know and what I know and everybody knows.

Mr. King: That is all.

* * * * * * *

[fol. 2454] Mrs. Agnes Steadman, a witness produced on behalf of the People in Surrebuttal, being first duly sworn testified as follows:

Direct examination.

* * * * * * *

Mr. Grinnell: Yes. (Questioning witness) You are employed by the Welfare Department, is that right?

A. Yes.

Q. And is that the department in which Mrs. Anderson is also employed?

A. Yes, sir, she is.

Q. And do you have certain cases or people's cases you take care of?

A. I do.

Q. And calling your attention to August or July and August of 1958, at that time as one of your cases did you have Mrs. Ferris, as one of your cases?

A. Yes, I did.

Q. Now was she known as Mrs. Ferris or Mrs. Atchley to you?

A. Mrs. Ferris.

[fol. 2455] Q. And I believe and Mrs. Anderson testified she was the worker just before you and that the case was given to you when she got her promotion, is that right?

A. Yes.

Q. Now about when did you take over the Ferris case?

A. About the last week in July I think.

Q. About the last week in July?

A. Yes.

Q. And do you recall Mr. Atchley coming to you about the time you took the case over or shortly thereafter?

A. Yes.

Q. And can you recall at this time what time that was?

A. I believe it was August 1st.

Q. August 1st, according to the calendar that is a Friday, does that seem about right?

A. I think so.

Q. And do you recall about what time Friday it was?

A. I believe it was right after lunch on Friday.

Q. And did he tell you whether or not he had been sent to see you by Mrs. Anderson?

A. No.

Q. Or that he had been to see her?

A. He told me he had seen her, yes.

Q. And what was he purpose now in coming to see you that Friday the 1st of August?

A. Well, I believe he hoped to convince me that he was supporting Mrs. Ferris and that she was not eligible for Needy Children Aid.

Q. And did he tell you at that time that they had been married?

A. Yes.

Q. And did he tell you at that time that he was the father of one of the children?

A. No.

[fols. 2456-2458] Q. Just simply that they were married?

A. Yes.

Q. Did he seem to be agree with Mrs. Ferris? Or did he seem to be trying to affect a reconciliation shall we say?

A. I felt he was a little bit angry with her, he was discussed with the situation and I feel he was angry.

Q. Do you recall anything at this particular time that caused you to feel or believe he was angry at her?

A. He had some checks he presented to me and hoped to prove with them that he was supporting her and he threw them down on the desk and I felt he was angry.

Q. His demeanor and attitude and conduct?

A. Yes.

Q. Seemed, appeared to be mad at her, is that right?

A. Yes.

* * * * * * *

Q. Do you recall whether or not he informed you at that time that they were living together or separated?

A. Mr. Atchley I believe told me that Mrs. Ferris had moved to Gridley.

Q. Did he tell you the reason for that?

A. No.

[fols. 2459-2474] Redirect examination.

By Mr. Grinnell:

Q. You mean he wanted her assistance changed?

A. Yes.

Q. That is what he wanted?

A. Yes.

Q. He didn't say anything abotu him wanting her to come back to him or come home?

A. No.

* * * * * * *

[fol. 2475] OPENING ARGUMENT BY MR. GRINNELL ON BEHALF OF PLAINTIFF

Mr. Grinnell: Now, as I started to say, Ladies and Gentleman, murder is the unlawful killing of another human being with malice aforethought, and it is present. That is what we are talking about when we are talking about murder. And then murder is divided into degrees. Murder second, murder first. The distinction between murder first and murder second is this: In murder first it requires deliberation and premeditation. There must be some deliberation and premeditation before you can find the defendant guilty of murder first. In murder second all that is required is malice aforethought. You do not see the deliberation and premeditation under the column I have labeled "murder second", so that is one distinction. Of [fol. 2476] course, I am going to be talking to you a great deal about these things and I am trying to make it as simple as I can because these concepts are somewhat difficult to grasp. So that we are talking about murder first, and then the degrees of murder. And we are concerned with whether or not there is deliberation or premeditation in both murder first and murder second. If we find no deliberation and premeditation but find the unlawful killing of a human being with malice aforethought, it is murder second. If we find added to that the deliberation and premeditation coupled with that we automatically have a first degree murder. Now do you understand? And this is entirely another concept which has no connection with the other two. And that is why I have drawn a separate box around it. By law in California, under our law, whether or not you find deliberation or premeditation if a person lies in wait for another person and kills them by means of lying in wait, by law that is murder in the first degree. It requires no deliberation and premeditation whatsoever by law. If you find in this case as we discuss it that Mr. Atchley lay in wait for his wife to return you do not and are not concerned with a finding of whether or not there was any deliberation or premeditation whatsoever because the law says that that is murder in the first degree. Now, as an included offense within murder defense counsel will point out to you very possibly that in his opinion his client is

guilty if anything of either murder second because he didn't [fols. 2477-2478] intend to do this or an included offense which we call manslaughter, which is divided into two groups: Voluntary manslaughter—you will note I have put it at the top—which is a killing of another human being, no malice aforethought required. That is why it is not listed there. It is a killing of another human being either while engaged in a sudden quarrel or in a heat of passion. So you will note that under voluntary manslaughter I have listed the killing either while engaged in the same quarrel or while a person is under heat of passion. A second part of manslaughter is called involuntary manslaughter, and that is concerned with a person killing another person without malice aforethought while doing a lawful act in an unlawful manner, or the reverse of that situation: An unlawful act in a lawful manner.

Of course, you will be instructed completely upon all these various phases that I have just gone over. However, in order to make my argument clearer to you I felt that it was necessary that you have some understanding of just what we are talking about.

. . . . . .

[fol. 2479] Now, it is the People's position that Mr. Atchley murdered his wife with malice aforethought, deliberation and premeditation. And I wish to discuss those with you first and then I wish to discuss the lying in wait with you. Now, what facts do we have in this case which indicate to a reasonable person—because, after all, we are asked as reasonable jurors to sit in this case in judgment of the defendant. Now, of course, the easy thing to do is to say, well, Mr. Atchley said he didn't kill her and therefore I have a reasonable doubt, therefore I should acquit him and go home and nobody will ever know the difference, because you jurors are not on trial. That would be the easy [fols. 2480-2482] thing to do. But remember, Ladies and Gentleman, that you twelve jurors in this case in a very real sense are law enforcement officers of our community. It is true that we can charge and did charge Mr. Atchley with this, but whether or not he is brought to justice depends upon the verdict of your jurors in the final analysis.

Now, I say what facts indicate to a reasonable person that Mr. Atchley desired to kill his wife that night and that this was not an unintentional mistake in killing or one in self-defense. First of all let's remember clearly please that Mr. Atchley went to Gridley that night of his own free will and accord, that no one asked him to go, no one told him to go. I listened in vain for evidence from the defendant or other witnesses that he had been in the habit of making night forays, night visits to his wife. This appears to be the first time since she had moved away from the home that he had taken the opportunity to go to see her at 2:30 in the morning. And I think that is quite apparent that the reason he went to see her was to catch her, as he said, with another man. Now, what the moral character of the deceased may or may not have been is of no concern to us.

. . . . . .

[fol. 2483] As I started to say a few moments ago, why is this murder in the first degree? First of all, I stated to you that no one forced Mr. Atchley to go to Gridley that night. But far more important than that, no one suggested that Mr. Atchley take a gun. He formed that intent himself to take a gun with him when he went to Gridley. Had he not taken a gun, of course, none of this would have happened. You say, well, what does that prove. Well, we have to take this thing a step at a time. Now you will recall that when Mr. Atchley was first apprehended—and I dwelled on this at some length—he told the officers that he had not taken the gun with him when he first went over there, that he had gone home and gotten it when he went back the second time. Now, of course, we may never know just exactly which it was. However, ask yourselves as reasonable persons. Mr. Atchley was mad that night. He has admitted he was mad. He went over there to see if she was running around with another man. And yet at the same time he explains that his trip [fol. 2484] was back to Oroville to see if she had had car trouble so he could help her out. I submit, Ladies and Gentlemen, that those are inconsistent by their very nature. He went over there to check on her to find out if she was going to come home with somebody else. And to explain

his trip home for the gun he tells you that he came back because he thought she might have had car trouble and he was out looking for her. I submit, Ladies and Gentlemen, that that is another example of riding both horses at the same time. He went over there, Ladies and Gentlemen, and he found his wife was not home. He went back home and got the gun and returned. Now, he was there the first time according to Mrs. Thomas at about the hour of 12:30. So he was either there right before or right after she got home with Barbara. I rather suspect from the evidence about what they did when they got home was that they played the radio, they changed clothes for a few minutes. And in view of the fact that Mrs. Atchley got home somewhere shortly after 2:00, taking the driving time into consideration from Gridley to Oroville and back I rather suspect that Mr. Atchley when he arrived there around 12:30 got there before Mrs. Atchley returned home with Barbara, and, not finding her there, returned to Oroville, taking the distance and the time into consideration. However, he did return. And here is the next point. When he returned what did he do? Now, the first time he just drove by, according to Mrs. Thomas, and noticed she wasn't home. He was aware the front porch was lit, the light was on, which indicated that she was not home and, fur- [fol. 2485] ther, that her car was not there. So that he didn't have to stop and go up and knock at the door to know. He knew by those two facts alone in just driving by that she was not home. Now, we know that he returned again. Now, as I pointed out a moment ago, is it reasonable to you that he went out looking for his wife, or is it more reasonable that, not finding his wife home when going over there with the expressed purpose of checking on her and not finding her home that he went home to get the gun? Now, which is more reasonable? Knowing Mr. Atchley, observing him and his standard, the way he lives, the way he conducts himself—because you have got to look at these things as a reasonable person. I believe that you would not be doing your duty properly if you were to accept Mr. Atchley's word and let it go at that for a number of reasons which I will point out later. The next important fact is that when he returned where does he park his car? Does he drive up in front of the house

or anything like that, or does he wait in the car in the driveway? No. He parks way up a block away and then he gets out of the car and walks down to the house. And he walks in the back way. Does this indicate to you a man who wants to meet his wife when she comes home and walk up to her and put his arms around her and say, "Honey, where have you been so late"? Or is this the action that a man who is going to do just what he did? He parks his car up the street, he sneaks down the street into the alley and in the back way. Is that more consistent with a man who is concerned about the well-being of his [fol. 2486] wife, or with one who is going to do her bodily injury? Now, these are facts in the case which you can't disregard. Mrs. Thomas said she saw him walk up the street about 1:20. The first time about 12:30 and the second time about 1:20. All right. Figure it out, Ladies and Gentlemen. You know the distance as well as I do from Gridley to Oroville. It is somewhere around 15, 16 miles. Figure it out. Some of you people live over there. Now, about what does it take to drive that? So if he drives by at 12:30 what time yould you expect him to get back considering that he went home and got the gun and came back? Mrs. Thomas said she saw him again at 1:20 and he was walking down the street. Now, when we put Officer Tamagni on the stand who checked the car out at 1:40, which is 20 minutes later, Mr. King thought that was very unusual, very, very unusual for an officer to check out a strange car at that hour in the morning. And yet that is what he is paid to do. But all I am pointing out to you is that Officer Tamagni's testimony is consistent with Mrs. Thomas' who said she saw him walk down the street at 1:20, twenty minutes later Officer Tamagni comes by and checks out the car. The car is there but Mr. Atchley is nowhere to be seen. By his statement he is waiting in the back yard, this man is waiting in the back yard to greet his wife when she comes home, "Honey, where have you been out so late?" This is the man who wants you to believe he is so concerned about his wife that a few minutes later he finds occasion to pump six shots into [fol. 2487] her body. Now, you have got to look at this thing in its true perspective. This is at 2:30 in the morning. So this woman comes home, she parks her car. What

does Mr. Atchley do? Does he walk out to the car and open the door for her and greet her? No. He hides at the corner of the house. Now, what does this indicate to you as a reasonable man? Isn't this more of the same —exactly the same conduct as going home to get the gun, parking up the street, hiding in the back yard, the corner of the house? Isn't that all consistent with what? Greeting his wife? Killing her? All of this conduct so far is consistent to a reasonable person that he is going to do her some bodily injury. All right. So he hides at the corner of the house. How many of you recall his description of her coming out of the house, coming out of the car and into the front yard? I am sure that you will all agree with me that the last thing that she ever expected to see that morning was her husband. I don't believe that there is anybody that feels that she expected to meet her husband there. There was certainly no indication of it by prior agreement or the fact that his car was parked there. So he steps out from the corner of the house. Now we are getting down to the point where it is critical. Up to this point, as I say, all of the factors indicate one thing. They do not indicate someone who is concerned over the well-being of their wife, but they rather indicate that he means some harm to her. No other reason for having the deadly weapon in his possession, no other reason for sneak-[fol. 2488] ing around as he was. And remember, Ladies and Gentlemen, at this point that when Mr. Atchley was first questioned by Mr. Lazier he said that—he said that Mr. Atchley told him he had reached the point where he couldn't live with her and he couldn't live without her. What do you think was going through Mr. Atchley's mind as he waited from 1:20 in the morning until 2:20, approximately an hour, for his wife to come home? Don't you feel that he, with this gun in his belt—that he certainly thought something about what he was going to do when she got home. If I were going to wait for my wife to come home and I had that much time to wait for her I believe I would be quite upset and nervous about it. I think that you would find that your stomach would be rolling over and over and over like that first cup of coffee at 10:00 in the morning when you have not had any breakfast and you are just like this all inside. Now, I think,

Ladies and Gentlemen, that that explains why Mr. Atchley had to go into the shed. I don't think that it had anything to do with any operation in Arkansas a year before when he was back there. I think that this thing was working on him. He knew that he was going to do this thing. I think that it was working on him to such an extent that he went in there because of the way this thing was reacting on him. And, Ladies and Gentlemen, this condition is by no mean unusual. Many, many people in time of fright and in time of extreme strain, emotional disturbance, have this very thing happen to them. Even in a simple burglary. We have had right here in this [fols. 2489-2521] county situations during the commission of a burglary where because of extreme tension and what not this will happen to them. So I submit that there is another factor which you may or may not take into consideration but which is one factor that you may say is consistent with these other findings, to-wit, we have a man who is extremely tensed up. And why? Because he wants to do something good? Or because he wants to do something bad? All right. He waits for her approximately from 1:20 until 2:20 or, giving him time to walk down the street—because Mrs. Thomas saw him about 1:20—he must have got in the back yard within several minutes thereafter. So he had a considerable wait. Now he tells us that his wife got out of the car. And we showed you her keys. They were still in her hand when she was found.

. . . . . .

[fol. 2522] You are just going to be given the law, period, and then you will have to fit the facts to the law, so when we talk about motive if you think of any fact I have not which may indicate to you in the juryroom of motive for the killing, of course discuss it with your fellow jurors, I am just merely attempting to point out some of the things [fols. 2523-2536] which, from the evidence in this case, indicates that there may have been a motive, and what that motive was, although we may not know for sure, and whether or not we decide that there was a motive as I have said, the Court will instruct you it makes no difference whether there was a motive for the killing or not. Second of all the Court is going to instruct you the law presumes that

a person intends the ordinary natural and probable consequences of his voluntary acts. That is a presumption of law, if you go out and do something, if you go out and drive your car down the street at 60 miles an hour the law presumes you intended to drive your car 60 miles an hour. If you go out and shoot your wife, the law presumes in the absence of contrary evidence that you intended to shoot your wife, so please when the Court instructs you that a person intends the ordinary natural and probably consequences of his acts this night, please remember that the Court's instruction is Mr. Atchley in the night time, not in the day time but in the night time sneaked over to Gridley, waited for his wife to come home, crouched at the corner of the house with a deadly weapon, with a gun, waiting for her to come, and shot her; and that is what the law is talking about when they say that a person is presumed to have intended the ordinary natural and probable consequences of his act, however, the instruction is much longer than that and you will be full instructed on that.

* * * * * * *

[fol. 2537] Now assuming we have disposed of self defense as a defense, then we work back up reversely and see, "Included offenses" down at the bottom of the homicide square is, "Manslaughter" and you will see manslaughter is divided into two categories, voluntary and involuntary. Voluntary manslaughter is a killing of another person without malice of forethought. It is a type of kill-
[fols. 2538-2549] ing that occurs as is indicated under the headnote, "Upon a sudden quarrel or heat of passion". We have none of those factors here. There appears to be no sudden quarrel, he had been waiting for some time for her to come home. In any event there wasn't much of a quarrel because all the neighbors heard was, "Oh, don't, oh, don't" followed by six shots and all Mr. Atchely could say immediately after the killing was he couldn't remember what was said and at the trial he said something to the effect "I asked her where she had been, Honey, and tried to put my arms around her and she replied, 'None of your business'," a further inconsistency, but neither one of those are by any stretch of the imagination, do either one indicate the sudden quarrel or heat of passion, there

doesn't seem to be any particular quarrel or any great heat of passion, any place on the face, or anything like that, they just met there it appears, so that I think we can safely assume we do not have a voluntary manslaughter. Do we have an involuntary manslaughter, that is likewise a killing of another human being without malice aforethought and it is defined as a killing which is done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

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[fol. 2550] Now what do you think, as I have mentioned earlier, what do you think that Mr. Atchley went through all of these various steps that he went through that night, without repeating them all, everything he went through was calculated for just one thing, he was going to do something to his wife. Why else would he have parked up the block, why else would he have taken the gun, why else would he have taken the secret route in the back, or hide at the corner; everything he did that night was calculated for one thing, to wait for her to come home and to shoot her when she came home and that is what he did. Whether or not it takes a moment, two moments, or an hour, it depends upon the circumstances. He waited there for [fol. 2551] some period of time. I think that our witnesses —Mrs. Thomas said he arrived at 1:20 which makes it roughly an hour, but suppose to take his own estimate of time he waited for her some 25 or so, what do you think he was thinking about in that 25 minutes, do you think he was thinking about the World Series or whether the Rams were going to beat the 49'ers or the condition of the moonlight that night or whether he was going to go back into the used car business again. The only thing he was thinking about, he was waiting for his wife to come home, with a gun, at 2:30 in the morning. He felt she was out with another man and by God if he couldn't have her nobody else was. That is Mr. Atchley. That is the kind of man he is, look at him, evaluate him, if he couldn't have her nobody else was, and he was convinced, Ladies and Gentleman, she was out with somebody else or else

why was he waiting for her with a gun and by God if she was out with somebody else—this is Mr. Atchley now, "If she was out with somebody else she was going to pay for it," because he wasn't going to let anybody do that to him. Not this woman nor any other woman. So he waited and he waited and he waited and he thought and he thought and he thought about this and he had the gun there all the time and it was loaded and he watched her come up, he watched her car lights come up the street and probably wondered, "I wonder if that is her or somebody else" and watched those lights pull into the driveway and knew that his wife was in that car and snook up to the corner of the [fol. 2552] house and watched her get out of the car, this man that was concerned about his wife.

Deliberation, premeditation, I would say that there are a few crimes, few homicides in this county in which the evidence during the past four years—and believe me we have had a rush of them, we have had a rush of homicides in the past four years, I can name five or six right off hand—but in not one of those homicides have we had a man sit out and deliberat-ly wait for the intended victim to come home as Mr. Atchley did. Not one of them, whether it is a 20 minute period or half an hour period have we had anybody sitting there coldly calculating, just sitting there at 1:20 in the morning, there is no light, you can't read the paper, you can look at the moon if you like, but he has only one thing in mind, he is mad at his wife and he is waiting for her to come home, and what do you suppose he is thinking about there, there in the dark, no radio to listen to, no television to listen to, this is all going on in his mind for the 20 minutes, just what is going to happen when his wife gets home. Deliberation and premeditation, once again I submit that if there was ever a case in this country, in this state, in this county in which the killer ever sat down as Mr. Atchley did and waited coldly for his wife to come home, this is the case.

All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree. We have right here the—to constitute this kind and [fol. 2553] degree of homicide the killing must be accompanied by a clear, deliberate intent to take a life. The intent to kill must be the result of deliberation and must

have been formed upon a pre-existing reflection and not under a heat of passion or other conditions such as precludes the idea of deliberation. All right, he sat there, he has waited for her for a period of time. He is not under any heat of passion except what is going on in his own mind. This feeling that he has towards his wife, that is what is going on inside of him, this feeling that she is out with somebody else. She is going to pay for that, Ladies and Gentleman.

The law does not require that such deliberation shall exist for any particular period of time or that any prescribed period of time shall elapse between the formation of the intent to kill and the act of killing. It is necessary only that the act of killing be preceded by, and be the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing.

That is what we have been talking about and once again as I mentioned to you a moment ago, the law does not undertake to measure in units of time how long this will take. It depends on different individuals, but certainly this crime started in Palermo when Mr. Atchley started [fol. 2554] out with a gun, whether it was the first time or the second time. He didn't take that gun over there for any reason except what he used it for, so that I believe that we could actually start the deliberation and premeditation in this case with the time he lifted it out of the holster at home when he left Palermo that night, whether it was before he came over the first time or second time, I don't care; but never had we had a case in this county in which you have a period of time as great as this for Mr. Atchley to think, to relect, to deliberate, and certainly you must assume that the thought about it. He hasn't indicated that his mind was a blank and everything that he did that night was consistent with somebody who was going to shoot their wife and escape detection. The guile, everything he did was consistent. He didn't do anything foolish that night except kill his wife. The actions that he took are consistent with some one who is going to commit a crime and he did commit a crime. So that I think that

we may say without any shadow of a doubt that we have malice aforethought and deliberation and premeditation in this killing.

Now, let's assume for a moment you choose to disregard my arguments in this particular case, suppose you find from your observation and summary of the facts that they are not consistent with your findings of the fact; is there another ground upon which you must and can and should find the defendant guilty of first degree murder. [fol. 2555] I say, "Yes" there are two additional grounds. The first ground being and the Court will instruct you upon lying in wait. "All murder which is perpetrated by means of lying in wait is murder of the firs' degree". Now we are not talking about malice aforethought and deliberation and premeditation now, we are talking about, "All murder which is perpetrated by means of lying in wait is murder of the first degree. To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve and intend to take another person unawares so as to do him bodily injury"—take another person unawares, hiding in the backyard, hiding at the corner of the house, parking your car way up the street so that she won't see it, taking another person unawares. I think that we can assume from that picture that Mrs. Atchley never saw Mr. Atchley until she dropped her purse. She walked, in other words, right into it. He waited right at the corner of the house for her. "To take another person unawares so as to do him bodily injury"—what do we have here. That is just what he was trying to do is take her unawares—"And must include, as a means to that end, a waiting and watching for an opportune time to do the act"—is he waiting, is he watching for her. He is waiting, he is watching, that is what he is doing, for an opportune time to do the act. "And also either a concealment in ambush or some other secrecy of design to take the other person by surprise". A concealment at the corner of the house, the back yard, to take the other [fol. 2556] person by surprise. Everything he did was to take her by surprise. "Lying in wait does not require any particular position of the body"—in other words you don't have to lie down on the ground and hide under the bushes, as long as you are concealed—"Or that the design-

ing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, providing that it's duration is such as to show a state of mind equivalent to premeditation and deliberation".

In other words he is waiting. He has waited for her to come home. Does that show deliberation. Does that show premediation. And why is he waiting for her to come home from this concealment, because he wishes to do her bodily injury.

When the killing of a human being amounts to murder and is accomplished by lying in wait it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill. When the killing of Mrs. Atchley amounts to murder and it is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause her death—but it is necessary that there be the intentional infliction of bodily injury upon the person killed under circumstances [fol. 2557] likely to cause her death.

As I said before lunch I might buy the story if he shot her once and I might possibly buy it if he shot her twice, not intending to kill her, but I don't see how any reasonable person can buy the story, can accept the story as reasonable that he shot her six times and didn't intend to cause bodily injury resulting in her death. He told you with his own lips that he knew she was dead when he walked out of the yard. So, when the killing, the homicide amounts to murder and is accomplished by lying in wait, you are instructed as a matter of law, and that is what I have been reading to you, is the law, you have been instructed as a matter of law that is first degree murder and that is what we have talked about—so that there are additional grounds for you to find the defendant guilty of first degree murder. First of all that he had malice aforethought and deliberation and premeditation. Second of all if you disregard that and you find malice aforethough present you can still, without finding deliberation and premedi-ation present

under the lying in wait instruction, find him guilty of murder in the first degree because that is the law, and I want you to clearly understand that there is a distinction. You may find the defendant guilty of murder in the first degree by finding the malice aforethought and the deliberation and premeditation present without any lying in wait whatsoever. Now if you find that there was lying in wait present then all you must find is malice aforethought which may be [fols. 2558-2582] shown to you by the lying in wait, any one of a number of factors which would indicate to you the malice aforethought, but finding the malice aforethought you need not go on to the next step, the deliberation and premeditation, because the law has instructed you that the lying in wait provides the necessary deliberation and premeditation, and by law makes it a murder in the first degree.

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[fol. 2583] Opening Argument by Mr. King on Behalf of Defendant

Jack Atchley in my mind after talking with him and after listening to him here on the witness stand and after reading, very carefully reading over his testimony and his cross examination I feel that Jack Atchley while he perhaps could be considered sharp in some things doesn't have the mentality that my boy for instance has, had when he was between 12 and 14, I would — closer to 12. Now if my boy were engaged in a scuffle and a gun went off, he could sit down here when he was 12 years old and he could tell us about what happened, but he has a vocabulary, he [fol. 2584] knows how to read and he can write, he has a vocabulary of several thousand words—probably 12 years old he probably had a vocabulary as you people and I have of maybe 10 or 20 thousand words. Now in going over this transcript, I went over it particularly in order to ascertain just what type of a mind Jack has. Do you realize he didn't use in all of his sentences, he didn't use 250 different words, his vocabulary is so limited that he couldn't possibly explain to you what he wanted to here on this stand. He couldn't explain to me and couldn't explain to the officers when they questioned him. Now you

heard the contradictory statements he made. You heard him say he had been up very late, kept awake for some 40 odd hours and that he was questioned endlessly by the officers in rotation to find out what went on here, and I will tell you and you can put this down as the truest thing that was ever said at that stage of the proceedings, and with his particular type of mind and his mental age, he was trying to avoid answering anything that might get him in trouble. He did that for two reasons. Up to the time he talked to Ray Travers he didn't want to let it be known just what exactly happened. He told you that he wanted a lawyer and that he had asked for a lawyer 10 or 12 times during the time of that conversation by the officers and he also told you and it was brought out here in that transcript of that testimony that you saw Mr. Grinnell reading from, a transcription of a tape recording that was [fol. 2585] taken when he was, while he was being questioned that early morning hour, he told them numerous times he wanted a lawyer, and that he would tell his lawyer the truth. Now with his particular type of intelligence, the only thing he knew he was in serious trouble. He knew that his wife was dead, he was tremendously affected, how would you feel or how would I feel if we had gone through something of that sort? It would simply upset us so badly, even with a vocabulary of 20 thousand words, that at first we couldn't explain what happened. Now while I go into that, let's say he might have been sharp, there is some testimony in this record that he took in $19,000 through his books in 1957, you remember him saying that. Well, anyone of us who knows anything about the used car business knows the profit on used cars, if he ran a net profit of 20 percent he was doing tremendously well so perhaps if he did make 20 percent he would have made $3,800 profit, on 25 percent it would be around $4,750 profit and it is probably between those two figures, he did make a little money but that isn't, this day and age with things as they are, a very high amount. He was working hard and he did make a little money but he didn't make $19,000 as Mr. Grinnell said, that he was making $19,000. You will very definitely recall he said he ran $19,000 through his books, that was his gross business that year.

All right now, going back, when Jack Atchley set here on this witness stand you could see he was groping for

words and you saw him misuse words, not one time but [fol. 2586] dozens of times you and I would never use, in trying to explain, he couldn't possibly explain; nor has he explained the things so that anybody would ever know what exactly he was trying to say. He was trying his best to tell you and he did tell you on this stand he didn't go over there with the intention of killing his wife, but on the contrary he went over there to freighten her. Now, I think that this is so important because we are dealing with this type of mind, we should take into consideration just what he said when he was trying to explain the thing to his friend his confidant, his business advisor Ray Travers. I don't want to say, perhaps call to your minds that Judas of Iscariot, one of the 12 disciples, who for 30 pieces of silver placed Christ on the cross, he didn't mean to do it that way, but Judas of Iscariot came to my mind when I seen Ray Travers take the stand, where he programed a conversation so that it would be recorded. He is trained he told you, in homicide, he worked as an officer of the law. He had gone in and talked to Jack and Jack made all of these admissions against his own interest, and don't you think for one moment if he had a confession to make that he wouldn't have made it; if Jack went over there with the intention of killing her he would have told Ray that then, that early morning, 10 o'clock when he first went in, and would have said, "Ray, I killed her and I went over there because"—of this or that, he would have put some motive to it. You understand that. I think it is so important. Now he didn't—he had two conversations with Ray, in the morning [fol. 2587] he told Ray what happened and in the afternoon Ray went back there at the solicitation of the Sheriff's office and they tape recorded the conversation. Now when Ray was cross questioning him, when he sat there and heard the questions coming, he could have said, "Now you are going too far, aren't you a police officer"—I never talked to the man but I could tell the way he questioned Jack Atchley that he was a police officer because police officers follow a very definite trend just the same as District Attorneys do. They don't try to secret or hid- the evidence but they try to make their case as strong as they can and he tried to make the case against Jack Atchley as strong as he could; and I think when Jack Atchley was in there that first meeting at 10 o'clock and before they knew any-

thing at all about a whole lot of these things that you have heard here, that Jack Atchley did tell Travers definitely what occurred there. Now let me just—excuse me for a moment and I will pick up that statement. Now I asked and received through an order of this Court the entire statement that was given to the officers and I also—maybe by luck—this statement of Travers was inbetween and I was going to introduce this statement to you, Ladies and Gentleman, if the State had not put it in, I would have put it in. Now let me go over the important parts of this statement. We should consider that what he told Ray Travers that morning is the strongest, and if it is the truth, maybe this man did not go over there with the avowed [fol. 2588] intention of killing his wife, that he went over there as he told you here in his poor crippled language that he went over there with the idea of scaring some man that he thought was coming home with her, and who in fact did come home with her. Now let me read here—now let me call your attention to the fact there was a lot of humming noise and if you do decide to play that recording back again, that you are no doubt aware that you can do so, follow it closely and see just as I saw when I heard it played, see the spaces and the noise, see where some of it isn't audible, there were a lot of things there that didn't go on that record. I wish we could have had a complete record of what was said in that morning's conversation because that morning's conversation, as Travers said, it was the same as the afternoon's but of course we know as reasonable human beings it couldn't possibly have been everything that was said in the morning's, but they had talked about the very matter of putting that—for instance the gun, putting that on the outside of his trousers and Travers said that they talked about it in the morning and the question was asked him in the morning as well as in the afternoon about that gun being open—that gun being outside—I don't care whether his shirt tail was out in the back or not, it was a hot summer evening. Chances are his shirt tail—I assume that Scharsch would see it—which I have serious doubts, as I will go into shortly—but assuming that you put that gun down there to frighten someone, he had every reason to believe, and we men here [fols. 2589-2624] know that he had every reason to believe

that she was coming home with another man and he wanted to frighten them.

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[fol. 2625] Why did I have to bring it out, because the physical facts of this case show, and I will show you (picking up weapon) to use this gun that, when Jack came around the side of the house with the gun in this position (demonstrating) and the woman grabbed it with her left hand, you see (demonstrating) as he testified the butt of the gun, right this way (indicating). That gun—and he lunged and grabbed it he said with both hands, and in Mr. Travers' statement and I submit this is very important, Line 15 in the statement, Page 46 of Travers' statement, "And what happened after she grabbed the gun out of your belt? Ans. When she grabbed the gun out of my belt I grabbed for it, see, and bent it back, bent her arm back". Now he was telling the truth on that point. Mr. Grinnell said here he wasn't in any fear, that there had to be fear in self defense, my gosh, if anybody would grab a gun out of your belt and start wrestling with it, after knowing what had happened out there in the house that time when they broke the window wrestling over a gun, and he said at that time he was afraid, as my memory serves me in this record, that he was afraid she was going to kill him when she pointed the gun at his head; they were wrestling over that gun when it actually went off, when she grabbed that gun with her left hand and it was twisted back here that [fols. 2626-2631] gun went off right here and shot her here (demonstrating), not from the back, under no stretch of the imagination could that woman have been shot from the back.

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[fol. 2632] Whether you believe—how much time he spent there, I am not going into all these conflicts in time. He testified in the tape recording and you can go along with that he was there 20 or 25 minutes, sitting up here. That is not an issue in this case.

[fol. 2633] But let me read you the tape recording. Now Jack, when he talked about that he thought the gun went off two more times, it couldn't have gone off two more times,

if you believe as I believe it was the first two shots that hit her first. It might have gone off four more times. He testified he either snapped or fired a shot at the man running down the street, and you remember this man came here, Mr. Wagoner, who testified he found that out there, that shot, out removed from the other area where the officers identified as where the five shots were. It would stand to reason if he did snap a shot at the man running down the street, and it is my memory of the testimony Mr. Atchley said he thought he did, when—if that gun went off in this fashion and the shots first were fired out towards the gate, if the gun went off in this fashion (indicating on diagram) and it kicked the shells out here and then if he swung around to shoot at the man, that other shell definitely would have been out there, which leads me to believe he actually did shoot. He said he didn't know whether it snapped, as I remember the testimony or not, he was so upset and so excited—may I be excused just a minute, I will have to get a glass of water, if the Court please.

Thank you, Your Honor. Now reading here from this transcript of what went on when Travers was there. Question, "Then what happened when she grabbed the gun out of your belt? Ans. When she grabbed the gun out of my [fol. 2634] belt I grabbed for it, see, and got ahold of the gun, and I bent it back, bent her arm back. Ques. Towards her again? Ans. Yes, and it went off three times. Ques. Three times? Ans. Three times. And then when I pushed her by the shoulder her arm came around, and I guess when I pushed her I pulled that son-of-a-bitch off two more times. Ques. In other words, you had the gun in your hand then? Ans. Yes." It is the only conceivable way that that could have happened. There is no other possible way it could happen, and when you go into the jury room I hope that you folks do a demonstration and make up your minds that that exactly is what happened. They had to be wrestling over that gun to have her fall as she did and get the shots in the position they were. You can forget about the witnesses here and all their testimony with the exception of the physical facts, as I told you, that that woman had to be going down in a falling position, that body had to be falling or she could not have been shot that way and under no conceivable theory, under no conceivable theory

could she have been shot at No. 5 because the doctor says it come in through her shoulder, under no conceivable theory could she be shot that way and fall and have those bullets go through as we had the testimony before you, it is just impossible. It is a physical impossibility, a mathematical impossibility, if you will.

Now he said he didn't see anybody at that time, he testified as my memory serves me, he thought he had hit that man. Now you can be well assured if he had hit that [fol. 2635] man he would probably be charged with another offense, he would have been charged with the crime of shooting the man, and he told you as I remember on the stand when he shot he thought he hit the man, it is very very understandable, you can very well understand why they didn't bring it out in this tape recording, if we had all of the testimony, my memory serves me he did testify here on direct examination he told Travers in the morning that he had shot down there, but it wasn't brought out in this testimony here, and this is what we have got to go on, not something that happened in the morning. Now he went back through this on several occasions after he talked—he sought him out—talked about this, Travers' statement on Page 50, he talked about shoving the gun down into his belt, "It was stuck down this way like that. Ques. Right inside of your belt? Ans. In behind my belt, my shirt was out. Ques. I see, and she could see it, in other words the shirt wasn't over it, you had your shirt tucked in? Ans. Yes. Ques. So she saw the gun? Ans. Uh huh. Ques. Then what happened? Ans. Well, she grabbed for it and she got the handle of it and pulled her out, and when she did that I reached and grabbed with both hands, see". There was a considerable conversation in the morning as Mr. Travers testified here and he knew exactly what questions he was going to ask Jack Atchley for this tape recording. He knew it was going to be tape recorded. Now can't you see the officer's mind coming in there, can't you see how he would program the thing, ask the questions so that the [fol. 2636] record would look as bad as it could look against the accused, that is very important, Ladies and Gentlemen. The attitude, the mental attitude that Ray Travers had in turning traitor, if you will, on his friend and client, Jack Atchley. He knew full well that that shirt tail was in and

that the gun was sticking out because right down here he said something about he was going over there to scare them, that he had no intention when he didn't see—reading from Line 2, Page 48, "Ans. At the corner of the house. Ques. And you had the gun in your belt. Did you make an attempt to pull the gun or anything? Ans. No, sir, when I seen nobody but here I didn't make no effort whatever. Ques. She seen the gun? Ans. She seen the gun. Ques. Then what happened? Ans. She grabbed it, lunged right onto it. That's all I could do. I didn't know anything else to do". There wasn't anything else to do but to grab on to that gun or he would have been killed. Now listen to this, "Where did you find the gun, where was the gun? Ans. The gun that I had? Ques. Yes, the gun that you had in your belt, did you bring the gun over with you? Ans. Yes". That very obviously in my mind refers to the car, he brought the gun over in the car. He was confused. The testimony has been substantially, as I remember it, that he didn't go down there with a gun the first time but he went down with the gun the second time, however, I didn't see any particular one way or the other whether he went down with the gun the first time or whether he went [fol. 2637] the second time with it. It would be an argument in our favor if he did go the first time with the gun, he was a man who carried a gun, he carried it around frequently, that gun went with him where ever he went from all the evidence in this case, and we are to believe it, now line 17, "Yes, the gun that you had in your belt. Did you bring the gun over with you? Ans. Yes. Ques. Well, you had it with you all that evening and you brought the gun over? Ans. Yes. Ques. And had it in your belt and you waited——. What did you have the gun in your belt for, for what purpose? Ans. I thought maybe" and then there is a big long pause, "I thought maybe—I went over there and I said, Well, she comes in with somebody, see. Ques. She was running around with fellows? Ans. Yes. Ques. Oh, I see. God O mighty, that would make a guy feel sort of bad. Ans. Uh huh. Ques. Did you just plan on scaring her or scaring him"—he brought that up because that conversation very evidently was all had over there in the morning, he told Travers in the morning conversation before this tape recording came in that he had planned to go over there and scare the man who came in there with his

wife. "She was running around with fellows? Ans. Yes. Ques. Oh, I see. God O mighty, that would make a guy feel sort of bad. Ans. Uh huh. Ques. Did you just plan on scaring her or scaring him? Ans. Yes, just scaring him. But I didn't intend to kill her at all, not at all." Now here again, "And you had the gun in your belt. Did you make an attempt to pull the gun or anything? Ans. No, sir. [fols. 2638-2653] When I seen nobody but her I didn't make no effort whatever". He probably would have pulled the gun if he seen the man there but he didn't see him, he was over at the side of the car. Now I hate to go back into it, but why didn't Officer Tamagni go down there and look around that block and see who followed her home in that dark car, why didn't he? Why isn't that man brought here? Now, "I'll be damned. Then you tried to get the gun away from her? Ans. Uh huh. Ques. That's when it happened. I think I got it pretty straight. Whose gun was it, was it registered in your name? Ans. No, wasn't."

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[fol. 2654] CLOSING ARGUMENT BY MR. MULKEY ON BEHALF OF PLAINTIFF

Mr. Mulkey: One other witness I mentioned to you, [fol. 2655] Judas Iscariot, otherwise known as Mr. Travers, but completely depicted to you by Mr. King as a Judas. Well, if Ray Travers is Judas Iscariot, or however you pronounce it, there is Jesus Christ (indicating defendant) is he? Are you even going to imagine that a man like that can be compared to Jesus Christ? I haven't got a vocabulary wide enough to describe that man. And if I have lost my temper in this trial, offended any of you, I hope I didn't hurt this case by doing it. But I can not be dispassionate about a man who sits down and pumps six shots into a woman. And does he ever sit here and say, "I am sorry, Ladies and Gentleman, my wife is dead. I have killed the mother of these children"? Oh, no. You never heard him say he was sorry about anything because he isn't sorry about anything. He is going to come up here and con you twelve people into turning him loose and maybe pin a medal on him. If that's what you want to do then justice goes out the window and I don't know what any of us should do any work for. This is not Jesus

Christ (indicating defendant). This is a man who very soon ought to be in a position where he is going to meet his Maker. But then he is going to come in with that background and say, "Little Brenda is my baby". Did he ever say it to anybody else before? No. This is a little sympathy getter. "Come on, let me off. I had a child by this no good, rotten witch." And that is what she is painted out to you, the woman he loved so awful much. He has chosen to bring into this courtroom, resurrect her from the [fols. 2656-2674] dead and make her the dirtiest thing that ever lived. That is love, Ladies and Gentleman, true love as I understand it. You do everything to save your neck, even crucify the woman you shot six shots into. But then Mr. King says there is an explanation for all that: Jack doesn't understand too well, Jack doesn't think too well, Jack has a vocabulary of 250 words. But when Jack told the truth—and this is Mr. King's words—told the truth to Ray Travers Jack didn't tell Ray Travers about the little man who wasn't there because he might get in trouble for shooting that man. Well, if he had that in mind when he talked to Ray Travers don't you suppose he thought he might get into a little trouble if he shot his wife?

Mr. King: Now, just a moment, if the Court please. I object to that. My statement was not that at all. It was that he did tell Ray Travers and that it didn't appear on the tape. I want that understood.

Mr. Mulkey: You heard the tape, Ladies and Gentleman, and I will stand on the tape. And that is another thing. Mr. King says, "I would have brought that tape into evidence, boy, if they hadn't." Mr. King objected to it, he objected to it. He didn't want it in here. He was overruled and it came into evidence.

* * * * * * *

[fol. 2675] EXPLANATION BY THE COURT OF INSTRUCTIONS ON MURDER ONE AND TWO

The Foreman: I would like to have the murder on one and two explained again.

Mr. King: If Your Honor please, there are several instructions on murder one and two.

The Court: That is correct. I will endeavor to read all of the instructions dealing with murder in the first and second degree, and then if there is anything further that you wish in that connection, why, you can let me know. The first instruction dealing with murder was a definition as follows:

(Reading) "Murder is the unlawful killing of a human being with malice aforethought. Such malice may be [fol. 2676] express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured.

"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second.

"All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree.

"All murder which is perpetrated by any kind of willful, deliberate and premeditated killing is murder of the first degree. To constitute this kind and degree of homicide the killing must be accompanied by a clear, deliberate intent to take a life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion or other condition such as precludes the idea of deliberation. The [fol. 2677] law does not require that such deliberation shall exist for any particular period of time or that any prescribed period of time shall elapse between the formation of the intent to kill and the act of killing. It is necessary only that the act of killing be preceded by, and by the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the

first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripe*d* into an intent to kill which is truly deliberate and premediated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death.

"All murder which is perpetrated by means of lying in wait is murder of the first degree. To constitute lying in [fol. 2678] wait, as the term is used in these instructions, a person's conduct must involve an intent to take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise. Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.

"When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death.

"Murder of the second degree must be distinguished not only from murder of the first degree, on the one hand, but from manslaughter, on the other. Manslaughter shortly will be defined for you, and you will note that an essential feature of that offense, which distinguishes it from murder, is that the killing be done without malice. If the unlawful killing of a human being is done with malice afore- [fols. 2679-2681] thought, but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of first degree murder, and is not perpetrated by means of poison, or lying in wait, or torture, and is not committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, then the offense is murder in the second degree. In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree in any of the following cases: 1. When the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another, or, 2, when the circumstances attending the killing show an abandoned or malignant heart, or, 3, when the killing is done in the perpetration or attempt to perpetrate a felony other than arson, rape, robbery, burglary or mayhem.

"When upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or of the second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

* * * * * * *

[fols. 2682-2689] VERDICT—DEGREE

The Clerk: (Reading:) In the Superior Court of the State of California, in and for the County of Butte. The People of the State of California, Plaintiff, vs. Veron Atchley, also known as Jack Atchley, Defendant. No. 33496.

Verdict of the Jury: We the jury in the above entitled action find the defendant Veron Atchley, also known as Jack Atchley, guilty of the crime of murder as charged in the information and fix the degree as first degree. Dated December 9, 1958, Signed Earl C. Howard, Foreman.

* * * * * * *

[fols. 2690-2777] MOTION TO OFFER ALL TESTIMONY AND EVIDENCE HERETOFORE RECEIVED

Mr. Mulkey: At this time, Your Honor, the People will offer in this proceeding all of the evidence, transcripts and proceedings heretofore had in the trial in chief before this jury, and on that evidence we will rest our case.

The Court: Mr. Mulkey, I think the motion should be that you offer in evidence all of the evidence heretofore admitted in the case.

Mr. Mulkey: Yes, Your Honor.

The Court: Not the transcripts. They are incomplete and they have not been proofread.

Mr. Mulkey: I refer to as contained in the transcripts. Just offering the evidence physical and testimonial that has heretofore been received.

The Court: The motion is granted and all of the evidence whether it is oral or paper or whatever it may be, the exhibits, are admitted in evidence for the purpose of this further proceeding.

Do the People rest?

PEOPLE REST

Mr. Mulkey: Yes, Your Honor, the People rest.

The Court: All right. The defendant may proceed.

* * * * * * *

[fols. 2778-2779] JUDGMENT

The Court: Is there any legal reason you have at this time why the Court should not pronounce judgment?

The Defendant: I have no further questions.

The Court: Now therefore, in accordance with the law in such cases made and provided it is ordered, adjudged and decreed that the defendant is guilty as charged and

that said Defendant Veron Atchley, also know as Jack Atchley is sentenced to suffer the penalty of death by the administration of lethal gas within the walls of the California State Prison at San Quentin, California in a matter prescribed by law;

It is further ordered that the said Defendant Veron Atchley, also known as Jack Atchley, be delivered by the Sheriff of Butte County to the warden of said California State Prison at San Quentin, San Quentin, California within 10 days from the time hereof, to be held by said warden pending decision or review of his case in any appeal from this judgment in the manner provided by law;

It is further ordered that said defendant is remanded to the custody of the Sheriff of Butte County, California. That is a formal judgment in this case.

[fol. 2780] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 2781] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

Crim. 6450

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

VERON ATCHLEY, aka JACK ATCHLEY, Defendant and Appellant

OPINION—December 1, 1959

A jury found defendant guilty of murder in the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and sentenced him to

death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant was born in 1917 and was reared in a mountainous community in eastern Tennessee. He attended school only through the third grade and cannot read or write anything except his name. Some time between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and a welder. He first met the deceased, Marcella Katherine (Farris) Atchley, when he was working near Fresno in 1953. He saw her a number of times before he left the Fresno area, and she [fol. 2782] bore a child that he claims is his. Defendant eventually entered the used car business in Palermo, California. He bought several lots, built houses on them, and lived in one of the houses with Jewel Spoon, a woman who served as his secretary and bookkeeper. He met the deceased again in 1956 when she came to buy a used car. She returned frequently and after a series of fights with Jewel Spoon moved into defendant's home with five of her children. Jewel retired to a trailer behind the house and later left town. Defendant and the deceased quarreled frequently, but late in 1957 they took a trip and were married in Georgia. They did not publicize their marriage, hoping to avoid a reduction in the aid that she and her children were receiving from the county welfare department.

During the last few days of July 1958 Mrs. Atchley and her children moved out of defendant's home to a house in Gridley, California. Although defendant assisted in making the move, a quarrel ensued and Mrs. Atchley complained to the police. Defendant then informed welfare personnel of her marriage to him. She in turn informed the authorities that defendant had been selling used cars without a license.

On the night of August 2, 1958, Mrs. Atchley went to a dance at Robinson's Corners with her oldest daughter and [fol. 2783] a young married couple. About 12:15 A.M. she drove her daughter home and then drove the young couple to their home in Oroville.

Defendant spent that evening drinking beer with several friends, but there is no evidence that he became drunk.

Some time after midnight he drove to his wife's house in Gridley and discovered that she was not there. He drove back to Palermo, looking for her at Robinson's Corners and at several taverns along the way. He then returned to Gridley and drove by her house again. Noticing that her car was still absent, he parked his car about a block away and took from the glove comparment a 22-caliber pistol loaded with six or seven bullets. He placed the pistol inside the belt of his trousers and approached the house on foot through a back alley. He then waited in the alley and in the back yard, where he could see the headlights of his wife's car when she drove in.

About 2:25 A.M. Mrs. Atchley drove up to the carport attached to one side of her house. While she was parking, defendant moved along the opposite side of the house and stood by the front corner. Mrs. Atchley walked around to the front gate and up the walk. As she neared the door, defendant stepped out towards her. In the ensuing few [fol. 2784] minutes she was shot once in the head, once in the left breast, three times under the right arm, and, according to the prosecution's experts, once in the back. Her body was later found about three feet from the front walk on the side opposite the point where defendant had stepped out. She was lying face down with her feet towards the walk and her head towards the carport.

Following the shooting defendant drove back to Palermo. He buried the gun in his back yard and hid the holster in an ash can. He then went to bed, where the police found him about 4:00 A.M.

At the trial defendant conceded most of the foregoing facts but maintained that he had been told that his wife was going out with another man, that he had taken the gun only to scare them, and that he had no intention of killing or injuring his wife. He stated that when he saw her returning alone, he stepped out to greet her; that his shirttails were tucked in so that the gun inside his belt was clearly visible; that she seized the gun and he struggled to recover it; that the gun went off several times during the struggle; and that after he recovered it, he fired it several more times. The defense introduced much testi-
[fol. 2785] mony that Mrs. Atchley had said she wished to kill de-
fendant, that she had threatened him with a

gun on several occasions, and that she was a violent and combative person.

Two neighbors testified for the prosecution that they were awakened by the voice of a women crying hysterically, "Oh, don't, don't," followed by a series of shots. Looking out their bedroom window they saw defendant in a stooping position, shooting towards the ground. Because an intervening fence obscured the body, they assumed that he was shooting at the tires on Mrs. Atchley's car. They and another neighbor, who saw defendant arrive and walk into the back alley, testified that his shirttails were out. Defendant admitted at the trial that the gun inside his belt would not have been visible had his shirttails been out. To rebut defendant's story of a struggle for the gun, the prosecution introduced evidence that all of the shots were fired from such a distance that the deceased could not have been holding the gun at the time, that Mrs. Atchley was found with her keys still clutched in her right hand, and that five empty cartridge casings were found so close to each other as to indicate that the shots had been fired with the gun in approximately the same position. Other evidence indicated that defendant had threatened his wife, that she was afraid of him, and that most of the threats [fol. 2786] and all of the acts of violence attributed to her occurred during the period of her conflict with Jewel Spoon.

Defendant contends that the trial court committed prejudicial error in admitting certain evidence. He argues first that certain photographs introduced by the prosecution were gruesome in character, were unnecessary to the prosecution's case, and were offered several days before they were to be used by the expert witnesses, for the sole purpose of inflaming and prejudicing the jury.

When allegedly gruesome photographs are presented, the trial court in the exercise of its judicial discretion must decide whether their probative value outweighs their possible prejudicial effect. (People v. Brubaker, 53 A.C. 36, 47; People v. Carter, 48 Cal. 2d 737, 751; People v. Cheary, 48 Cal. 2d 301, 312.) In the present case some of the challenged photographs show the deceased as she was found in her front yard, with bullet holes and bloodstains on her dress and blood on her face. They were used to illustrate

testimony about her wounds and to show the relative positions in which the body and various items of evidence were discovered. Other photographs show the deceased lying on a table at the mortuary, naked above the waist, with blood smeared on her face. These pictures were used [fol. 2787] to show the location and nature of her wounds and to explain the basis for expert opinions as to the position of the gun when the shots were fired. Although many of these photographs are decidedly unpleasant to view, they are not comparable to those held inadmissible in People v. Redston, 139 Cal. App. 2d 485, 490-491, or People v. Burns, 109 Cal. App. 2d 524, 541-542, where the deceased was shown with a shaved head and disfigured by an autopsy. In view of their probative value, the trial court did not abuse its discretion by admitting them. It was also within the discretion of the trial court to permit all the pictures taken by the same photographer to be identified at the same time, even though many of them were not to be used until later in the trial.

Defendant also contends that the trial court erred in permitting the introduction of a tape recording of a conversation between defendant and his insurance broker, Ray J. Travers. The conversation took place in the interrogation room of the county jail two days after defendant had been arrested and before he had obtained a lawyer. Defendant was unaware that his words were being recorded and did not know that Travers had formerly been a police officer or that he had agreed to question defendant so that the recording could be made. In response to Travers' [fol. 2788] questions defendant admitted arming himself, concealing himself, watching and waiting for his wife, surprising her, and firing several shots while the gun was in his hand. He maintained, however, that the shooting occurred during a struggle for the gun and that he had no intention of killing the deceased. Defendant contends that these recorded statements constitute a confession and that they were made involuntarily because Travers held out as an inducement the payment to Mrs. Atchley's children of the proceeds of an insurance policy on her life. The People contend that defendant's recorded statements do not constitute a confession and were therefore admissible even if involuntary.

There has been considerable confusion as to the admissibility in a criminal proceeding of statements allegedly made by the defendant involuntarily. (See People v. Linden, 52 A.C. 1, 29, footnote 8.) Many opinions distinguish "confessions" and "admissions," and state that the latter are admissible without regard to their involuntary character. (E.g., People v. Adams, 198 Cal. 454, 465; People v. Fowler, 178 Cal. 657, 664-665; People v. Garcia, 124 Cal. App. 2d 822, 825-826; People v. Trawick, 78 Cal. App. 2d 604, 608; People v. Cummings, 7 Cal. App. 2d 406, 408; see People v. Wolfe, 42 Cal. 2d 663, 670; People v. Ferdi- [fol. 2789] nand, 194 Cal. 555, 568-569.) The distinctions between confessions and admissions, however, are "subtle and questionable."[1] (People v. Chessman, 52 A.C. 481, 506.) Moreover, a number of early cases suggest that even admissions must be excluded if involuntary. (People v. Ah Fook, 64 Cal. 380, 381, 382; People v. White, 47 Cal. App. 400, 401; People v. Harris, 45 Cal. App. 547, 551; People v. Quan Gim Gow, 23 Cal. App. 507, 510-512.) More recently, this court has stated that "the necessity for determining the voluntary character of the statement does not depend upon whether or not it constitutes a confession of guilt." (People v. Nagle, 25 Cal. 2d 216, 222-223; see People v. Gonzales, 24 Cal. 2d 870, 874-875.) We have

[1] For example, in People v. Arnold, 108 Cal. App. 2d 719, the defendant was charged with murdering two men, Cavness and Greenway. His statement to the police after his arrest that he shot Greenway "because he saw me shoot Cavness," was characterized as a "statement of his reason for shooting" and held to be an admission, not a confession. In People v. Cryder, 90 Cal. App. 2d 194, the defendant made an allegedly coerced confession to robbery and a subsequent statement, also allegedly coerced, that his confession was in the main correct. The latter statement was held not to be a confession. In People v. Cronevitch, 86 Cal. App. 646, the defendant was charged with burglarizing certain hotel rooms. After he was arrested and some of the stolen property found in his possession, he was asked when he had entered the rooms. His reply that "all the rooms were entered between two and four o'clock, as people were sound asleep at that time" was held not to be a confession.

required preliminary proof of the voluntary character of statements that include "an important incriminating fact." [fol. 2790] (People v. Nagle, supra; see People v. Eggers, 30 Cal. 2d 676, 689; People v. Quan Gim Gow, 23 Cal. App. 507, 512.) Limitation of the exclusionary rule to full confessions has been rejected not only by the foregoing opinions of this court (People v. Eggers, supra; People v. Nagle, supra; People v. Gonzales, supra), but also by the American Law Institute (Model Code of Evidence rule 505) and the National Conference of Commissioners on Uniform State Laws (Uniform Rule of Evidence 63 (6); see also 78 A.B.A. Rep. 134). Moreover, the Supreme Court of the United States has held that the due process clause of the Fourteenth Amendment requires exclusion of coerced admissions if they are sufficiently damaging. (Ashcraft v. Tennessee, 327 U.S. 274; but cf. Stein v. New York, 346 U.S. 156, 162-163, footnote 5.)

Involuntary confessions are excluded because they are untrustworthy, because it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (People v. Berve, 51 Cal. 2d 286, 290, 293; see Watts v. Indiana, 338 U.S. 49, 54; Lyons v. Oklahoma, 322 U.S. 596, 605.) All these reasons for excluding involuntary confessions apply [fol. 2791] to involuntary admissions as well. (See Opper v. United States, 348 U.S. 84, 90-92; Falknor, The Hearsay Rule and Its Exceptions, 2 U.C.L.A. L. Rev. 43, 68.) Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.

The People contend . . . that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an induce-

ment for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

[fol. 2792] Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on Leyra v. Denno, 347 U.S. 556. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the "doctor" a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of "mental coercion." Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement. (People v. Connelly, 195 Cal. 584, 597; People v. Castello, 194 Cal. 595, 602.)

While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court [fol. 2793] sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred.

Defendant contends that the trial court erred in permitting the People to introduce on rebuttal a letter purportedly written by the deceased to Judge Savage two days before she was killed. The letter itemized alleged sales of used cars made by defendant without a license, stated that

defendant had threatened the deceased, and expressed her fear of him. Defendant contends that the introduction of this letter on rebuttal was prejudicial because he was unfairly surprised late in the trial and because several prosecution witnesses who could have been examined with regard to the letter and its contents had been finally discharged and could be recalled by defendant only as his own witnesses. The letter was admitted, however, with a limiting instruction, solely to show the deceased's state of mind and not to show that defendant had threatened her. It [fol. 2794] was therefore not objectionable as hearsay. (People v. Brust, 47 Cal. 2d 776, 784-785; Adkins v. Brett, 184 Cal. 252, 255-259.) It tended to prove her fear of defendant, which was relevant to defendant's claim that she was the aggressor in a struggle for the gun. Since the claim of self-defense was raised as part of the defendant's case, the letter was admissible in rebuttal.

Defendant contends that the trial court committed prejudicial error in refusing to order the prosecution to produce certain rent receipts and in admonishing the jury to disregard defense counsel's statement that he would prove the receipts to be forgeries. Defendant asserts that he should have been permitted to use the receipts to impeach the prosecution's witness, Barbara Farris, who testified on cross-examination that she had never forged a rent receipt for the deceased and that she had seen the deceased pay rent to defendant and defendant give receipts for it. The question whether rent receipts had been forged to deceive the welfare authorities was clearly collateral to the issues being tried. The trial court had discretion to foreclose further inquiry along that line, even for purposes of impeachment. (See Witkin, California Evidence § 673.) Moreover, in support of his request for the receipts, defense [fol. 2795] counsel offered to show merely that they were forged by Barbara "or someone else." Such a showing with regard to the particular receipts in question might well have been consistent with Barbara's testimony. Its value as impeachment, therefore, was questionable.

Defendant also contends that the trial court erroneously permitted the prosecution to cross-examine him improperly. The assistant district attorney asked him whether or not he had told the truth while testifying under oath in a prior and unrelated criminal proceeding. Defendant argues that

this questioning was not proper impeachment and was beyond the scope of matters raised on his examination in chief. (See Pen. Code, § 1323.) On direct examination, however, defendant testified in detail as to the finances of his household, which had apparently given rise to numerous quarrels with the deceased. In particular, he stated that she had paid him no rent. In the prior proceeding he had testified that a certain check constituted payment of rent she owed him. This testimony directly contradicted the statement made by defendant on direct examination. Even though the matter was collateral to the issues being tried, the trial court had discretion to permit the defendant to be questioned for purposes of impeachment as to his own prior inconsistent statement. (See Witkin, California Evidence § 673.)

[fol. 2796] Defendant was also asked on cross-examination to demonstrate certain aspects of his alleged struggle with his wife. He argues that this demonstration violated his privilege against self-incrimination and that it was not proper cross-examination because not restricted to matters about which he was examined in chief. Defendant testified on direct examination that he had been carrying a loaded pistol inside his belt, that his shirttails were tucked in so that the gun was plainly visible, that he had scuffled with his wife for possession of the gun, and that it had gone off during the struggle. On cross-examination he was required to put on the shirt he had worn on the night of the killing, to show how he had carried the gun, and to demonstrate with an assistant district attorney his and his wife's movements during the alleged struggle. These matters were clearly raised by his direct testimony. He was also asked how long his wife's arms were, and replied that they were about the same length as his own. He was then asked to hold the gun at arm's length pointed towards himself with a finger touching the trigger. The distance from the muzzle to his body was measured and found to be 10 inches. This part of the demonstration, in combination with the testimony of the prosecution's experts that the gun was fired from at least 24 inches away, was directly related [fol. 2797] to defendant's statement on direct examination that the gun had gone off while he and his wife were struggling for it. The entire demonstration, therefore, was within the scope of permissible cross-examination

(Pen. Code, § 1320; People v. Ortiz, 66 Cal. App. 154, 156), and defendant waived his privilege against self-incrimination as to the matters involved when he voluntarily raised them on direct examination. (People v. Arrighini, 122 Cal. 121, 126; People v. Gallagher, 100 Cal. 466, 474-476; People v. Withers, 73 Cal. App. 2d 58, 60-61.)

Defendant contends that the prosecution was guilty of prejudicial misconduct in its closing argument. The assistant district attorney suggested to the jury that the deceased had been shot initially in the back as she turned to run away. Defendant complains that this suggestion was based on facts not in evidence. There was evidence that a wound in the deceased's back marked the entrance of a bullet. From the position in which the body was found and other evidence, it clearly could be inferred that the deceased had turned to run. Although there was no evidence of the order in which she received the various wounds, the assistant district attorney's suggestion was nonetheless based on a reasonable interpretation of the evidence, and was therefore within the scope of permissible argument. (People v. Cheary, 48 Cal. 2d 301, 317-318; People v. Burwell, 44 Cal. 2d 16, 39-40.)

[fol. 2798] The assistant district attorney also argued to the jury that if the prosecution's eye witnesses were unable to see the killing from their bedroom window, as the defense had suggested, defense counsel would have requested that the jury view the premises. The basis for defendant's objection to this argument is not clear. It is generally permissible to argue to the jury that an adverse inference should be drawn from the opposing party's failure to produce the strongest available evidence. (Cf. Pen. Code, § 1323.) Moreover, defense counsel had ample opportunity to respond to the argument or to point out that a countervailing inference could be drawn from the prosecution's failure to request a view.

The assistant district attorney misstated the law, however, when he told the jury that the killing of a human being while in the commission of a felony, to wit, assualt with a deadly weapon, is murder of the first degree. (See Pen. Code, § 189.) Shortly thereafter he corrected his error and apologized to the jury. The court gave accurate instructions on murder and its degrees, and repeated those

instructions at the jury's request shortly before the verdict was returned. It must be presumed that the jury followed the court's instructions and that defendant was not prejudiced by the assistant district attorney's earlier misstatement of the law.

[fol. 2799] The trial court instructed the jury that murder is in the first degree if perpetrated by lying in wait. (Pen. Code, § 189.) Defendant contends that the court's instruction were erroneous in that they permitted the jury to convict defendant of murder in the first degree without finding malice aforethought. The court, however, clearly defined murder in terms of malice aforethought.[2] The next succeeding instruction differentiated the finding of murder from the determination of degree.[3] All instructions on lying in wait expressly presupposed a finding of murder.[4] Defendant's contention is therefore without merit.

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[2] "Murder is the unlawful killing of a human being with malice aforethought.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured."

[3] "Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second."

[4] "All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree."

"All murder which is perpetrated by means of lying in wait is murder of the first degree.

To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve an intent to

[fol. 2800] Defendant also contends that there was insufficient evidence to justify giving an instruction on lying in wait. The elements necessary to constitute lying in wait are watching, waiting, and concealment from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. (People v. Thomas, 41 Cal. 2d 470, 473.) The testimony of one neighbor indicated that defendant waited behind his wife's house for over an hour. The evidence included admissions by defendant that he parked a block away to conceal his presence, that he waited behind the house for about 25 minutes, [fol. 2801] that he was watching for the headlights of his wife's car, and that he surprised her by stepping out "right into her face." From the fact that he had armed himself with a loaded pistol and the evidence indicating that he shot her almost immediately upon her arrival, the jury could reasonably conclude that he was waiting for her with the intention of shooting her and that the shooting was accomplished "by means of" his watching and waiting in concealment. There was therefore sufficient evidence to justify giving the instruction.

Defendant contends that the trial court erred in excluding certain medical testimony as to defendant's mental

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take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise.

Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation."

"When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death."

condition at the time of the shooting. He relies on People v. Wells, 33 Cal. 2d 330, which holds that medical testimony as to mental state is admissible to show lack of malice aforethought or lack of premeditation and deliberation. In his offer of proof, however, defense counsel stated that the proposed testimony would bear on defendant's ability at the time of the trial to remember what had occurred. There was no suggestion that it would bear on malice aforethought, premeditation, or deliberation. (Cf. People v. Wells, supra, at 345.) The record does not show, therefore, that evidence relevant to these issues was excluded. [fol. 2802] Defendant did offer to elicit the doctor's opinion as to whether, in view of defendant's state of mind at the time of the shooting and after his arrest, it would be "normal" for him not to remember the details of the shooting or his statements to the police. He also proposed to ask the doctor about the reflex action of the trigger finger of a person under stress. The trial court ruled that the jury could evaluate these matters without the help of an expert. Both the mental stress created by involvement in a killing and the effect of such stress on finger reflexes, however, were "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (People v. Cole, 47 Cal. 2d 99, 103; George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 844.) As to both matters, therefore, the trial court's ruling was erroneous.

The erroneously excluded evidence was significant because defendant relied primarily on the theory that the shooting was accidental or in self-defense. Since no other witness observed the first shots, it was critical whether the jury believed his story of a struggle for the gun. The proposed testimony as to reflexes might have served to render that story more credible by providing an explanation of why so many shots were fired and why defendant [fol. 2803] continued to shoot after recovering possession of the gun. The proposed testimony as to defendant's inability to remember might have served to make defendant appear more truthful by rebutting the prosecution's suggestion that he was lying about his memory.

Upon examination of all the evidence, however, it does not appear that the erroneous exclusion of this medical testimony resulted in a miscarriage of justice. (See Cal.

Const., art. VI, § 4½.) Although the testimony as to reflexes might have made defendant's story of a struggle more credible, there was abundant evidence inconsistent with a struggle, including the distance from which the shots were apparently fired, the proximity in which the five empty cartridge casings were found, the fact that defendant had armed himself and waited for his wife, the cry heard by the neighbors, and the fact that virtually every bullet in defendant's gun entered her body. Although the tesimony as to defenda. 's inability to remember might have met one line of attack on his credibility, other lines of attack were given far more emphasis by the prosecution. Defendant was shown to have lied repeatedly to the police after his arrest and to have lied under oath in a prior criminal proceeding. Moreover, his credibility was important primarily as it affected the jury's belief in his story [fol. 2804] of a struggle for the gun. The evidence inconsistent with that story was abundant and convincing. There is therefore no reasonable probability that admission of the excluded medical testimony would have persuaded the jury to reach a different result. (See People v. Watson, 46 Cal. 2d 818, 836.)

The judgment and order denying a new trial are affirmed.

Traynor, J.

We Concur: Gibson, C. J., Schauer, J., Spence, J., McComb, J., Peters, J., White, J.

[fol. 2805] [File endorsement omitted]

Crim. No. 6450

[Title omitted]

December 31, 1959.

ORDER DENYING REHEARING—Filed December 30, 1959

Appellant's petition for rehearing denied.

Gibson, Chief Justice.

[fol. 2806] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2807] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No.

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 28, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 28, 1960.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of March, 1960.

[fol. 2808] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 961 Misc.

VERON ATCHLEY, also known as JACK ATCHLEY, Petitioner,

vs.

CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 23, 1960

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 950. The execution of the sentence of death imposed on the petitioner is stayed pending the decision of this Court and the issuance of the mandate thereon.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961

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PETITION NOT PRINTED

Office Supreme Court, U.S.
FILED
MAR 21 1961
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA.

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA.

BRIEF OF PETITIONER

Reference to Reported Opinions

No opinion was rendered by the trial court.

The opinion of the Supreme Court of the State of California is officially reported in *People* v. *Atchley,* 53 Cal. 2nd 160, 246 P. 2nd 764.

Jurisdictional Statement

1. The date of the judgment under review and the time of its entry is December 1, 1959. (*People* v. *Atchley,* 53 Cal. 2nd 160, 246 P. 2nd 764; R. 560.)

2. A petition for rehearing duly filed was denied on December 30, 1959 (R. 575).

3. Upon petition, Mr. Justice Douglas extended the time for filing petition for a writ of certiorari to April 28, 1960 (R. 575).

4. Petition for certiorari was filed April 26, 1960, and granted May 23, 1960 (R. 576).

5. Jurisdiction is conferred upon the Court to review the judgment in question by way of certiorari by the provisions of 28 USC 1257(3) and 2101 (d), and Rule 22 (1) of the Court.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, section 13:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel . . . "

California Penal Code, section 189:

> "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate

arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

California Penal Code, section 190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the State prison from five years to life."

California Penal Code, section 190.1:

"The guilt or innocence of every person charged with an offense for which the penalty is the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceeding on the issue of penalty, or the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden

of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by a court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury, unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury, unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury trying the issue of penalty is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the cause of penalty, but the issue of guilt shall not be retried by such jury."

Questions Presented for Review

1. Whether the Constitutional requirements of Due Process under the Fourteenth Amendment are fulfilled where the only suspect in a homicide case, having but a third grade education and unable to read or write other than to sign his name, in a state of shock, is held and questioned over a period of 48 hours, with little or no sleep, at which point a confession is not only extracted, but tape-recorded, by one who defendant thinks is acting as his trusted business advisor and friend but is, in fact, acting at the instigation of law enforcement officers.

2. Whether due process has been accorded and the defendant granted his right to counsel in a meaningful way

where, in addition to the facts recited in paragraph 1, above, such confession was secured at a time when counsel was denied defendant, despite his repeated requests therefor.

Statement of the Case

At approximately 3:07 a.m. on the morning of August 3, 1958, a deputy sheriff found the body of petitioner's wife in the yard of her home at Gridley, California (R. 88-89). Slightly less than an hour later, officers went to the home of petitioner at Palermo and took him into custody (R. 400-401).

To place the case in its proper perspective, petitioner's education, experience and background must be considered. Veron Atchley, commonly called Jack (R. 355) was born in Cleveland, in the mountain country of Tennessee (R. 351, 352, 355) of a farm family of 12 children (R. 356). He was 42 years old at the time of the trial (R. 352, 355). Going to school for three or four months a year, he managed to complete the third grade, but he has never learned to read or write, excepting that he can sign his name (R. 358).

Like many others, Jack Atchley was drawn to the west coast and came to California in 1943 (R. 393). He worked first irrigating in Southern California (R. 359); moving northward, he was employed in a Modesto cannery (R. 360) and then as a welder in the San Francisco ship yards (R. 360). Arriving in Butte County, he operated a bar in the small town of Palermo for two months (R. 365) and then moved on into the used car business (R. 289, 365, 366, 393), which he continued until the end of 1957 (R. 395). In the last year of this venture, the gross volume of business which went across his books was about $19,000, but Atchley was unable to estimate how much of this constituted his net profit (R. 307). After giving up the used car business, he

went to work thinning peaches (R. 297). In any event, he had enjoyed at least a modest success and had previously made a down payment of $600 on the purchase of two lots (R. 363). In his business dealings, he depended upon others to read the necessary documents to him (R. 359).

The instant conviction aside, Jack Atchley has virtually no criminal record. Except for two or three charges of disturbing the peace when he was a lad in his teens in Tennessee, his only conviction was for drunk driving, the penalty being a $250.00 fine (R. 357-358).

Finding this suspect at the pre-dawn hour, the arresting officers talked with him and defendant told them, falsely, that he had not been to Gridley and did not own a .22 automatic gun (R. 401-402). At the trial, he was unable to recall what other statements he had made at that time, and it does not appear from the record that the arresting officers testified.

Some two hours later, at approximately 6:00 a.m. August 3rd, petitioner was questioned in the interrogation room at the sheriff's office by the Sheriff's Chief Investigator, Walter S. Anderson (R. 149-150). In response to questions put to him Atchley then stated, in substance, that he had not been in Gridley on the previous night, that he had never owned a .22 pistol but that his wife had and had disposed of it, that his wife's former husband, one Jones, might have killed her, and that he had gone to bed about 12:30 the night before (R. 150-151).

The next officer to question the suspect was Herbert E. Lazere, employed by the State Department of Justice, who began his interrogation at about 11:30 p.m. on August 3rd (R. 121). Atchley told him that he had visited two or three taverns on the previous night and retired about midnight; that he did not presently own a .22, but earlier had had a .22 Luger which he sold to his wife who, in turn, had

disposed of it. Again he said that Braxton Jones, the former husband, might be responsible for the homicide (R. 122-124). He admitted having threatened his wife at an earlier date (R. 125). This questioning continued on through the night until about 5:00 a.m. of August 4th (R. 129).

Defendant had not slept all day Saturday, August 2nd, nor that night, nor all day Sunday or Sunday night, August 3rd (R. 382). During all of this time, he was in a state of shock and upset to such a degree that he couldn't realize what he was saying (R. 412-413), having been up for 48 hours (R. 415). While he was not denied an opportunity for sleeping, the accommodations were such that he could not do so (R. 418-419).

Lazere, accompanied by the Sheriff and the Chief of Police, resumed his interrogation at about noon on August 4th (R. 127). Before this session, although the times do not appear with certainty, defendant had, eight or ten times, asked for an attorney (R. 382, 436). Shortly before the interview took place, a gun and holster had been found (R. 173-174, 169-170) and they were shown to the defendant, who then admitted that he had been in Gridley and that his wife had been killed in a struggle (R. 130-131). Defendant further admitted he had gone to his wife's house to look for her, suspecting she was out with some other man (R. 131); that he did not park his car in front of the house, and that he had spent some little time in a shed at the rear of the property (R. 131). Atchley stated that when his wife arrived she had the gun in her hand and pointed it at him, and that it went off in the ensuing struggle (R. 132).

About 6:00 p.m. on August 4th, Roy J. Travers received a telephone request to visit the defendant next day at the jail. Travers complied and saw defendant about 10:00 a.m.

(R. 224). Travers, an insurance agent (R. 224), had been a friend of defendant's for about a year and had done business with him (R. 240). Defendant had called upon him for advice concerning a bond in connection with his business (R. 521), a life insurance policy (R. 524), and an automobile policy (R. 526). What defendant did not know was that Travers had previously been a deputy sheriff in the State of Nevada for three and a half years, two years of which had been in investigating homicides (R. 246-247).

Travers and Atchley discussed the life insurance of the deceased (R. 230); the other details of this first conversation do not appear, except that it was stated to be substantially the same as their second conversation (R. 232), which will be discussed presently.

When Travers and Atchley finished their talk, a deputy sheriff approached Travers as he was leaving and suggested that he return for another interview. The deputy also asked whether Travers would mind if the interview were tape recorded. Travers acceded to both requests (R. 234) and about noon (R. 224) went back into the interrogation room. Now Travers took the initiative and asked defendant questions about the shooting (R. 232, 236). At the trial, Travers admitted that he used the same pattern in questioning Atchley as he had used when a deputy sheriff working on homicides (R. 247). He assured defendant that he would not write down anything defendant told him, that he did not want anything on paper (R. 195). In order to elucidate details of the shooting, Travers told Atchley that he had to know because he had to write it all out for the company (R. 199). The record is void of any suggestion that he cautioned Atchley that the statements would, or could, be used against him.

Atchley related to Travers that he had been standing at the corner of the house; when his wife arrived, he stepped

around the corner and "right into her face" (R. 195); that she saw the gun in his belt and made a lunge for it and it discharged (R. 196); he stated he did not have the gun the first time he went to his wife's home and went back for it (R. 196), but he denied any intention to kill her (R. 197). Atchley further said he had gone to Gridley about 2:00 a.m. and waited about 25 minutes for his wife (R. 199). The statement is replete with coarse and profane language (R. 194-201).

On August 7th, Officer Anderson and another officer drove defendant to the mortuary to pay his last respects to his wife, leaving the sheriff's office at about 12:20 p.m. Atchley told them that he had gone to Gridley armed with a .22 automatic, that he parked his car and stood under a walnut tree for five to fifteen minutes waiting for his wife, but that he did not go into the shed (R. 152-154). He also mentioned his wife's arrival, her reaching for the gun and being shot in a struggle over the weapon (R. 157).

At the trial, on direct examination, defendant related his activities earlier in the evening (R. 374-375) and then testified that on arriving at his wife's home he went to the little shed to relieve himself, then walked toward the front of the house, then to the back, then once again to the front, whereupon his wife arrived (R. 377). She grabbed for the gun and was shot in scuffling over it (R. 379). He testified that he did not intend to shoot his wife when he went looking for her (R. 381).

The tape recording of the conversation between Atchley and Travers was played to the jury and admitted in evidence (R. 237-238).

In his opening argument to the jury, the prosecutor stressed that defendant could be found guilty of first degree murder, without deliberation or premeditation, if the killing were done by lying in wait (R. 533, 534, 538, 539, 540,

542, 544, 545-546). The Court also instructed fully on lying in wait (R. 32, 34). Apparently the jurors did not clearly understand the original instructions distinguishing first- and second-degree murder, for they returned for further enlightenment on the question (R. 555-558).

The verdict found defendant "guilty of the crime of murder as charged in the information" and the degree was fixed as first (R. 4).

Under California law (P.C. 190, 190.1) a separate trial was had to determine the punishment to be inflicted; and there was received in evidence, on the State's offer, all of the evidence theretofore admitted (R. 559). On December 17th the same jury decreed the death penalty (R. 59).

Petitioner has not burdened this discussion with any of the facts leading up to the killing, or the prior threats and assaults made by the deceased upon the petitioner, nor, indeed, the actual facts of the homicide, for these matters are not germane to the constitutional issues and related factual questions now before the Court.

ARGUMENT

A.

The Finding by the State Court That the Confession Was Voluntary Is Not Binding Here, and This Court Must Make Its Own Determination From the Uncontroverted Facts in the Record.

The rule is now so firmly established as to be beyond question that when the claim is that the confession is the product of coercion, this Court must make its own examination of the record to determine whether that claim is meritorious; and the performance of this duty cannot be fore-

closed by the finding of a court, or the determination of a jury, or both. (*Payne* v. *Arkansas*, 356 U.S. 560, 2 L. Ed. 2nd 975, 78 S. Ct. 844; *Chambers* v. *Florida*, 84 L. Ed. 716, 209 U.S. 227, 60 S. Ct. 472; *Brown* v. *Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397.) As said in *Watts* v. *Indiana*, 338 U.S. 49, 93 L. Ed. 1801, 69 S. Ct. 1347:

> "...'(I)ssue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper application, are issues for this Court's adjudication...."

This being such a case, it remains now to examine the uncontroverted happenings to see whether they measure up to the Constitutional requirements.

B.

Petitioner Was Convicted in Contravention of His Right to Due Process of Law by the Use of a Confession Which Was Not the Product of His Free Will.

Through juridical history, and particularly in the Anglo-Saxon countries, the use of confessions extorted by torturing the accused have been abhorred. The rule was crystallized by this Court in a particularly shocking case of physical brutality in 1936, when, in *Brown* v. *Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682, it was held that a conviction in a State court based upon a confession so secured amounted to a denial of due process. Through the years, the Court has been called upon to consider cases where, although physical violence is not alleged, the confession is the end product of psychological coercion. Clearly the law

now is that such coercion so offends the civilized standards of this country as to taint the confession it produces equally as does physical violence. Varying factual situations have been held to show so great an overcoming of the will of the accused that due process has been denied. (*Chambers* v. *Florida, supra; Wade* v. *Jackson* (2nd Cir.), 256 Fed. 2nd 7, cert. den. 78 S. Ct. 1152; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 88 L. Ed. 1193, 64 S. Ct. 921; *Haley* v. *Ohio*, 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302; *Fikes* v. *Alabama*, 325 U.S. 191, 1 L. Ed. 2nd 246, 77 S. Ct. 281; *Watts* v. *Indiana, supra; Payne* v. *Arkansas, supra; Spano* v. *New York*, 360 U.S. 315, 3 L. Ed. 2nd 1265, 79 S. Ct. 1202; *Leyra* v. *Denno*, 347 U.S. 556, 98 L. Ed. 948, 74 S. Ct. 716.)

In the nature of things, no all-inclusive rule can be laid down, settling for all time what is, and what is not, sufficient to overcome the will of every man charged with crime. By the same token, no one factor by itself can be found which will render a confession involuntary. Wisely, the standard which has been set is based upon the total facts in each particular case. (*Fikes* v. *Alabama, supra; Payne* v. *Arkansas, supra.*) The totality of the facts here permits of no conclusion other than that petitioner's confession was so improperly obtained as to vitiate his conviction. Let us consider the circumstances, seriatim:

1. The record does not disclose whether or not petitioner was arrested upon a warrant.

2. Petitioner was in custody, and had been for some time, prior to the taking of the confession. It is not contended that this fact alone is conclusive; but incarceration with the unusual tension which it produces, must be taken into account along with the other factors as bearing upon the mental state of the accused. (*Ashcraft* v. *Tennessee, supra.*) Considering the type of man petitioner is (see *infra*, next

paragraph) it cannot be doubted that being incarcerated by the authorities would have a marked effect.

3. Petitioner was illiterate, with a meager third grade education. His only serious prior brush with the law was a traffic offense, involving a $250.00 fine. The record leaves his financial success in doubt, for it is common knowledge that a $19,000 gross used car business involves a profit of perhaps one-fourth of that figure. Yet even a successful business man may be subject to psychological coercion. (*Sampedro* v. *Puerto Rico*, 281 Fed. 2nd 888.) Regardless of petitioner's success in that business, the record shows him to be not a business tycoon but a humble, menial laborer. Here is a major distinction between this case and *Stein* v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, where the defendants were hardened criminals, experienced in the ways of crime and its detection and fully cognizant of their rights.

4. Petitioner was in a state of shock and upset. He was arrested at four o'clock on a Sunday morning, not having slept the previous day or night. Two hours later he was questioned, and then again at 11:30 p.m. on Sunday night, continuing until 5:00 a.m. of Monday morning. Although the assailed confession was not made until the following day, the record does not compel the conclusion that petitioner had adequate sleep to restore him in the meantime. While it is not contended that the authorities actively prevented petitioner from sleeping, the accommodations afforded him were such as to make sleep impossible. No claim is made that he should have been given luxurious quarters—the point is the effect which the surroundings and the lack of sleep had upon his mental state and will power. (See *United States* v. *Murphy* (2nd Cir.), 222 Fed. 2nd 698, cert. den. 350 U.S. 896; and cf. *Sampedro* v. *Puerto Rico*, *supra*.)

5. Petitioner was cut off from his friends and denied his right to counsel. The latter point will be more fully developed in argument under "E", *infra*. But the lack of counsel remains a factor to be considered in determining whether the confession was a voluntary one. For all the record shows, the only person whom petitioner was permitted to see during the period in question was Roy J. Travers, the man who at the suggestion of the police, in the guise of a friend of petitioner, elicited the questioned confession.

6. Petitioner was overreached and, in effect, overborne, and the tape-recorded confession was the result. Petitioner looked upon Travers as a friend and counselor; when he asked Travers to see him, the only fair inference is that he wished to discuss problems relative to his wife's insurance. It is unnecessary to consider what the result would be if there had been but one conversation between the men which the State put before the jury through Travers' testimony. That is not the case. The State was not content to rest there, but asked Travers to talk to Atchley again; and, without his knowledge, defendant's words were tape recorded.

Nowhere does it appear that Travers told petitioner that he did not have to discuss the matter and that he had a right to remain silent. Granted, no such warning against self-incrimination would have been required of Travers, the insurance agent. But when Travers becomes the *de facto* agent of the police, knowing that the conversation is being recorded, standards of decency and fairness make it incumbent upon him as to caution defendant as to his privilege against self-incrimination. What does Travers in fact do? He tells the petitioner that he must have all of the facts for the insurance company; he insinuates, by saying he wants nothing in writing, that this is a conversation con-

fidential between the two men; he draws upon his previous experience in law enforcement investigation to draw out damning statements from the defendant's lips. It is no answer to say that petitioner had been given the traditional warning by the *de jure* officers, for he knew not that Travers was (in effect) one of them. Travers did not don a badge and a uniform; but, at the request of the officers, he deluded petitioner if, indeed, he did not perpetrate an actual fraud upon him. Petitioner had, prior to his conversation with Travers, resisted giving any really incriminating statements to the police; considering his limited education and his lack of criminal experience, it is not unreasonable to suppose he felt himself at their mercy and was, as a result, wary of them. Travers, his friend, appeared as a familiar advisor, a shield, someone to lean upon; petitioner had no reason to suspect a secret betrayal. Such subtle, invidious methods were not unknown during the Inquisition; they are not unknown as a form of brainwashing in totalitarian states today. But they are inimical to the American concept of justice and to the requirements of due process. (*Fikes* v. *Alabama, supra.*) And such methods are just as effective to break down the resistance and overcome the free will of an accused as are others heretofore condemned by this Court.

7. The methods of the State in securing the confession and in using it at the trial raise a suspicion that the aim was to secure a conviction at all costs. Petitioner at first denied any connection with the homicide; after the gun and the holster were found he admitted being at the scene but claimed that it was his wife, not he, who came armed; and he did not then make what could be construed as a confession. Obviously the authorities were not satisfied. Just as obviously they hoped to obtain—and did obtain—an incriminating statement by using Travers as they did. What petitioner had previously told them, or a showing of

the falsity of his statements, might be some indications of guilt; his recorded conversation with Travers certainly made the work of the State easier. Other questions come to mind from the State's insistence upon playing the recording to the jury, offering them not only defendant's self-ineriminating statements in his own voice, but his profane language as well. Why? Assuming, *arguendo*, although not conceding, that the conversation was admissible, they had Travers who could have testified to it. They also had Officer Anderson, to whom later and similar statements were made. Clearly, after having obtained the confession by unconstitutional means, the State felt that it could not secure a conviction without the use of this tainted evidence, without regard to petitioner's right to due process. No problem of the protection of society will arise by rejecting the use of this confession; to bar the methods here present will not prevent the police from a fair questioning of those suspected of crime, but will estop them only from unfair questioning. The methods of criminal procedure employed by a State cannot include methods which are in conflict with constitutional guarantees. (Mr. Justice Frankfurter, concurring in *Haley* v. *Ohio, supra.*)

A juror, like any human being, is prone to give more weight to a tape-recorded conversation than to a narration of the same conversation by one of the participants, or to the exposition of some other conversations. No one can tell what weight this recording had upon the jury. They might have concluded that malice aforethought had not been shown but that the recording established a homicide by lying in wait. They might have thought it proved a case of first degree murder, ruling out second; clearly, since they returned for additional instructions, they entertained some doubt upon the question. Neither can we speculate the weight, consciously or subconsciously, given to the recording when the jury assessed the penalty at death, rather

than life imprisonment. For this reason, such a coerced confession vitiates the judgment. (*Payne* v. *Arkansas, supra.*) While it is not incumbent upon petitioner to show prejudice as a result of the use of the confession, in passing we may paraphrase what was said in *Bram* v. *United States*, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183, and reflect that the State, having gone to the lengths which it did to secure the recorded statement, cannot now take the inconsistent position that it had no impact upon the jury.

It is submitted that this case is closely akin to *Leyra* v. *Denno, supra*, and *Spano* v. *New York, supra*. Here, petitioner's will was overborne by official pressure, by fatigue, by sympathy falsely manifested by one whom he thinks is helping him. Here, too, we have an illiterate defendant, from whom the police are seeking a statement with which to convict him. The totality of the circumstances in this case compel a finding that the confession was coerced, that it was not an expression of free choice, and that its use before the jury denied to petitioner the Due Process of Law guaranteed him by the Fourteenth Amendment.

C.

Whether the Statements Be a Confession or Mere Admission, Defendant's Constitutional Rights Have Been Violated and the Conviction Cannot Stand.

Previously, the California courts have drawn a line of demarcation between admissions and confessions. But even if this be considered as merely an evidentiary rule and hence of state concern, no fine, technical distinction between a confession and admissions intrudes in this case. By its ruling, in what is now the law of the case, the Supreme Court of California has held that the rule of exclusion is the same as to both types of inculpatory state-

ments. (*People* v. *Atchley*, 53 Cal. 2nd 160, 246 P. 2nd 764 (R. 560, 565-566); and see also 48 Cal. Law Rev. 697.)

D.

Due Process Is Denied When a Conviction Is Secured by Means of an Involuntary Confession Regardless of Its Truth or Falsity and Regardless of Other Corroborative Testimony.

Once it has been established that a confession obtained in violation of Due Process standards has been used as a part of the evidence to convict, it becomes immaterial that there may have been sufficient other evidence to sustain the conviction. (*Malinski* v. *New York*, 324 U.S. 401, 89 L. Ed. 1029, 65 S. Ct. 781; *Lee* v. *Mississippi*, 322 U.S. 742, 92 L. Ed. 330, 68 S. Ct. 300; *Brown* v. *Allen, supra.*) Indeed, the Fourteenth Amendment operates to prohibit the use of such statements, even though the matters therein contained may be independently established as true. (*Rochin* v. *California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205.) Here, as in *Malinski*, which is much like the instant case in pertinent areas, the judgment should be set aside as violative of substantive due process. So it is no answer for the State to argue, as probably will be done, that petitioner's subsequent statement to Officer Anderson or his trial testimony should operate to cancel out the violation of petitioner's constitutional rights. For this reason we do not argue at length the proposition that, considering the circumstances of this case and the kind of a person petitioner has been shown to be, the initial fraud perpetrated upon him carry over and taint the later statements. It has been judicially noticed that there is no scientific basis for any presumption that psychological coercion wears off more quickly than physical violence. (*Sampedro* v. *Puerto Rico, supra.*) The

rule which governs here is as stated by Mr. Chief Justice Warren in the recent decision in *Blackburn* v. *Alabama*, 4 L. Ed. 2nd 242, 361 U.S. 199, 80 S. Ct. 274:

> ". . . (T)he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction. . . . (C)oercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition. . . . (T)here are considerations which transcend the questions of guilt or innocence. . . . Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment without exclusion of the confession."

E.

Defendant's Constitutional Rights Were Further Violated Where, in Addition to the Use of a Coerced Confession, His Requests for Counsel Have Been Denied.

Recognizing that this court has not spoken with one voice as to the effect under the Federal Constitution of a denial of counsel in a state court proceeding (*Crooker* v. *United States*, 357 U.S. 433, 2 L. Ed. 2nd 1448, 78 S. Ct. 1287), we respectfully urge that the problem be re-examined and with particular consideration of Article 1, section 13, of the Constitution of the State of California, which contains a guaranty of counsel. The State has adopted the guaranty and protection extended by the Constitution of the United States to criminal trials in federal courts. Having done so, it is bound to assume the same standard. Stated differently, California was, at least within limits, free to provide for the right of counsel or not; having done

so, it is bound by the Constitution of the United States to make the right which it has granted a meaningful one. And, as noted in the dissent in *Crooker, supra,* the need for counsel is as great at pre-trial as at any time during the proceedings. Whatever the view of the majority as to whether or not a denial of counsel in a state court is, *per se,* sufficient to vitiate a trial and conviction, they have recognized that it is a pertinent circumstance to be weighed in determining whether a conviction is the product of fundamental unfairness. (*Cicenia* v. *LaGay,* 357 U.S. 504, 2 L. Ed. 2nd 1523, 78 S. Ct. 1297.)

Certain factors are relevant in the instant case as bearing upon the effect of the denial of petitioner's requests for an attorney. For one thing, this is not the case of failure to advise a defendant of his right to counsel; nor does it involve an attempt by an attorney, unsolicited by the defendant, to see him. It is submitted this is a far more grievous case; defendant wanted an attorney and eight or ten times made his request known. It was ignored. He did all that he could do. He asked to see Roy Travers, an insurance agent. This request was granted and, as has been shown, Travers became, in effect, a police agent who secured a confession.

The authorities here were not merely trying to solve an unsolved crime and interrogating one of a number of suspects. The record makes it clear that they felt confident that they had the guilty man and that the sole purpose of the questioning was to secure a confession. It would not be unfair to infer from the record that they felt that Travers, because of his relationship with petitioner, would be more effective than they themselves had been. Defendant had previously asked for an attorney. Perhaps we can speculate that, had he been granted the right to consult with legal counsel, his need to see Travers would never

have arisen; surely his attorney could have taken care of the insurance problems. Surely, too, an attorney worth his salt would have advised petitioner to make no statements.

In addition to the damning effect which the tape-recorded statements had (and which might well never have come about had petitioner had counsel), those statements bear directly, to petitioner's prejudice, upon the degree of the crime. Here, as in *Moore* v. *Michigan*, 355 U.S. 155, 2 L. Ed. 2nd 167, 78 S. Ct. 191, the aid of counsel might have done much to establish a lesser degree of the substantive crime or to have mitigated the sentence. Here, as in *Moore*, we have a defendant of limited education and mental capacity deprived of his right to counsel. Here, as well, under California law (P.C. 190, 190.1) we have, in effect, two trials to the same jury, the first to determine guilt or innocence and the degree of the crime, the second to determine the penalty. Here the jurors not only had in mind the statements of petitioner when they found him guilty of first degree murder; his own words were still ringing in their ears when they meted out the severest punishment known to the law. We cannot and need not speculate the effect the coerced confession played. It tainted not one, but two, trials. It was indelibly written on the minds of the jurors, not merely through the testimony of a witness, but by the playing of a tape recording—the only evidence so produced at the trial.

In *Malinski, supra*, as here, the defendant was not allowed to see a lawyer, despite his request to do so, and was allowed to see no friends except the one to whom he confessed. In considering whether or not in this case the State has so violated its own constitutional requirements as to constitute a denial of a federal right, it is pertinent to note that in virtually every case where a confession has been so

coerced as to be a denial of Due Process, there has been an absence of counsel, frequently a denial of a request for counsel. It seems clear that the states, and not California alone, are especially prone to deny counsel to a man in such a case. And, as noted in another connection, to enforce this right which is guaranteed to petitioner here by the Constitution of his State, will not hinder the police in the detection of crime by fair methods but it will deter them from unfair means. It will be one more step toward insuring that the states have the freest possible scope in their methods of criminal procedure, and that they will still operate within constitutional limitations (*Haley* v. *Ohio*, *supra*) for the protection not only of this lowly petitioner, but for all citizens and for the preservation of the Constitution.

Conclusion

The introduction and use of petitioner's confession to Travers to convict him and the denial of his right to counsel transgressed the imperatives of fundamental justice as expressed in the Fourteenth Amendment, and the judgment should be reversed.

Dated, March 13, 1961.

Respectfully submitted,

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FILE COPY

PETITION NOT PRINTED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, ALSO KNOWN AS JACK ATCHLEY,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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No. 95

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of the State of California (R. 560-574) is reported in *People* v. *Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of California was entered on December 1, 1959 (R. 560). A timely petition for rehearing was denied by that court on December 30, 1959 (R. 575). On March 28, 1960, by order of Mr. Justice Douglas, the time within which to file a petition for writ of certiorari was ex-

tended to April 28, 1960 (R. 575). The petition was filed on April 26, 1960, and granted on May 23, 1960 (R. 576). The jurisdiction of this Court rests on 28 U.S.C. 1257(3) and 2101(d). See also Rule 22(1) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, Section 13:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his

failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Constitution of the State of California, Article VI, Section 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, Section 189:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

California Penal Code, Section 190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life."

California Penal Code, Section 190.1:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

QUESTIONS PRESENTED

1. Where a petitioner gives a voluntary statement to his insurance agent involving the details of the offense with which he is charged and the insurance agent upon request of the police repeats this interview with petitioner in order that it may be tape recorded, does the admission of such tape recording in evidence constitute the use by the state of a method of law enforcement which is constitutionally impermissible?

2. Where a petitioner in the state trial court does not deny the voluntariness of his incriminating statements after a foundation has been laid as to their voluntary nature and where his counsel on argument states that if the prosecution had not introduced such statements he would have, does the introduction in evidence of such statements constitute a denial of due process of law?

3. Is the taking of a statement by the police from a petitioner either suspected of or charged with crime prior to the time such petitioner obtains an attorney of his own choice a denial of due process of law?

STATEMENT OF THE CASE

At approximately 2:30 a.m. on August 3, 1958, Mrs. Atchley was shot and killed in the front yard of her home in Gridley, Butte County, California (R. 100, 111, 266).

Several days previously she had separated from her husband and moved with her children from Palermo to Gridley (R. 74, 372). On the evening of August 2 she had taken her eldest daughter together with a young couple to a dance (R. 75, 78-9, 85). They returned to Gridley about 12:15 a.m., she left her daughter at home and drove to Oroville to take the other couple home (R. 76, 81, 87). While she was doing this, petitioner at about 12:30 a.m. came to her home (R. 112). He parked his car a block away and walked to the house (R. 112, 114, 172-3). When he did not see Mrs. Atchley's car and no one answered the door he left and searched for Mrs. Atchley around several bars (R. 375-6). He returned to her premises at about 1:20 a.m. (R. 118-9, 386). He again parked his car a block away from the house, took from the glove compartment of his car a .22 caliber gun which he placed in the belt of his trousers and went to her house through the back alley (R. 118-119, 376-8). He remained in a shed in the back of the premises for a short time and then waited in the back until he could see the headlights of his wife's car as she drove in (R. 376-8).

When Mrs. Atchley returned about 2:25 petitioner was on the side of the house opposite the carport (R.

377). Mrs. Atchley left the car and neared the front door of the house with the keys in her hand (R. 377-8, 380). Petitioner stepped from the corner of the house toward her (R. 377-8). In the next few minutes Mrs. Atchley was shot six times, once in the head, the left breast, three times under the right arm and once in the back (R. 256-262). Five empty cartridge cases were found so close to each other as to indicate that the shots had been fired from the gun in approximately the same position (R. 91, 178). The victim's clothing indicated that the gun was at least two feet from the victim at the time of the shooting (R. 147).

The neighbors had been awakened by a woman's voice hysterically crying "Oh, don't, don't" (R. 96-7, 105). This was followed by a series of shots (R. 96-97, 105). They observed petitioner in a stooping position shooting toward the ground (R. 97, 101, 103). Their view of the body was obscured by a fence (R. 97, 101, 102). The neighbor asked "What in the hell is going on over there" (R. 97). Petitioner immediately left the scene in a very fast manner, obtained his car and drove away at a high rate of speed (R. 98, 102, 113-115). Petitioner returned to his home in Palermo, concealed the holster in a rubbish barrel and buried the gun used in the killing beneath a clod of dirt in his backyard (R. 170-2, 175-6). He then went to bed (R. 400-401).

The police were notified and arrived at the murder scene at 3:07 a.m., August 3 (R. 88-9, 100). Petitioner

was contacted at his home in Palermo at 4 a.m. and brought to the county jail (R.400-401).

Petitioner was first questioned at 6 a.m. by Mr. Anderson, an investigator for the District Attorney's office (R. 104-5, 149-152). He stated that he was not in Gridley that night, denied owning a .22 caliber automatic but stated that his wife had formerly owned one which she sold to another man about a month previously (R. 150-2). He stated that he had retired in Palermo at 12:30 a.m. (R. 151); he also stated that he had heard a Mr. Jones had threatened Mrs. Atchley and he might have done the shooting (R. 151).

Petitioner was not again questioned until 11:30 p.m. on August 3, when an investigator for the State Department of Justice arrived (R. 121-122). This investigator, Mr. Lazier, introduced himself to petitioner and told him that he had been requested by the District Attorney to assist in the investigation of the murder of Mrs. Atchley (R. 122). Mr. Lazier made no promises of immunity or threats to induce petitioner to talk to him (R. 122). Petitioner knew he was booked for investigation of murder and did not appear nervous (R. 129-30).

In outlining his activities on August 2-3, petitioner denied going to Gridley, presently owning a .22 caliber automatic and gave a similar statement to that given to Mr. Anderson about his wife's selling such a gun to another man (R. 123). He stated he thought a man by the name of Braxton Jones (a former husband of Mrs. Atchley) had killed her as he had heard

Mr. Jones had threatened both him and Mrs. Atchley (R. 124). Petitioner admitted that he, himself, had previously threatened Mrs. Atchley but stated that she was the type of woman he couldn't live with or without (R. 125).

After this conversation with Mr. Lazier, another conversation was had with petitioner by Mr. Lazier, Sheriff Gillick, Deputy Sheriff Ishmael and the District Attorney (R. 126-7). The same information was obtained (R. 127). The questioning continued until about 5 a.m. on August 4 (R. 129). At this time petitioner was returned to his cell where he slept (R. 129). He did not wish breakfast (R. 129, 418-419).

At noon on August 4, after the police had located the gun and holster at petitioner's premises, the officers returned with them to the jail (R. 127-8). They made no promises or threats to petitioner (R. 127). They showed the articles to petitioner who stated "I heard you had located the gun" (R. 130). Petitioner then changed his former story and admitted he had buried the gun in the back yard and placed the holster in the trash barrel where it was found (R. 130-1). He admitted that the first statements he had given the officers were not true (R. 131). Petitioner at this time stated he had driven over to Gridley on the night of the shooting, parked his car about one and a half blocks away from his wife's home, entered the premises by way of the back alley and spent some time in the shed in the rear of the premises (R. 131, 133). He felt if his wife saw his car, she would not stop (R.

131-2). When he heard his wife's car come into the carport he went around the corner of the house and proceeded toward his wife (R. 132). His wife had a gun in her hand which after a struggle went off several times (R. 132). He wrestled this gun away and it went off several additional times (R. 132). By then she was lying on the ground so he took the gun, drove back to Palermo, buried the gun and concealed the holster (R. 132).

Late in the afternoon of August 4, petitioner telephoned Ray Travers who was his friend and insurance agent and asked him to come to the jail (R. 224-5, 227, 231). Mr. Travers arrived at 10 a.m. on August 5 (R. 224). He had a conversation with petitioner relative to an insurance policy on the decedent which was payable to her children (R. 225-6, 230, 232). During the course of this conversation, petitioner of his own volition told Mr. Travers of the events occurring on the evening of the shooting (R. 232-233). As Mr. Travers was leaving the jail, he told the police officers about the statement petitioner had made to him (R. 224). At their request he agreed to have a second conversation with petitioner which could be tape recorded as Mr. Travers also needed more information for the insurance company (R. 232, 234).

At about noon on August 5, Mr. Travers returned and had another conversation with petitioner (R. 224). This conversation was a free and voluntary one, Mr. Travers making no promises or inducements

to petitioner (R. 225-227). Petitioner knew this information was going to be reported to the insurance company (R. 234). This conversation was tape recorded and introduced as Peo. Ex. 34 (R. 188-223, 238).

In this statement, petitioner stated that on the night of the shooting he was standing behind the corner of the house when Mrs. Atchley took her keys out and started to reach for the door; that he then stepped around the corner of the house (R. 195-6, 199). She saw the handle of the gun sticking out of the belt of his trousers, although his shirt was out, and she made a lunge for it (R. 196-7, 199). She grabbed for the gun, they struggled and petitioner bent her arm back (R. 196, 197). The gun went off three times (R. 196, 200). Petitioner pushed her by the shoulder, her arm came around and the gun went off twice more while petitioner had it in his hand (R. 196, 200). Mrs. Atchley fell right there (R. 196, 200).

Petitioner admitted that he had the gun over a year and stated he kept it in the glove compartment of his car (R. 199); that on the night in question he brought the gun to scare the fellow Mrs. Atchley was running around with but did not intend to kill Mrs. Atchley (R. 197). He admitted arriving at her house at 2 a.m. and waiting for her return at the corner of the house for about 25 minutes (R. 197, 199). He also admitted burying the gun and holster at his own premises after the shooting (R. 200).

Petitioner was not questioned again until August 7, 1958, when he was taken to view his wife's body at the mortuary (R. 152-3). In this conversation which was a free and voluntary one, petitioner told the same general story as in the Travers statement (R. 153-161). He also stated that the gun had been loaded previously, that it had held nine shells, three of which had at a prior time been expended on shooting some cats (R. 158-9); that when he returned to Palermo, there were no more shells in the gun. (R. 159).

At the trial, petitioner conceded the majority of facts contained in his statements but maintained that he had taken the gun only to scare his wife and had no intention of killing or injuring her (R. 373-379, 381). He testified that when he saw her returning alone, he stepped out to greet her, that she saw the gun visible under his shirttail; that she seized the gun and as he struggled to recover it the gun went off several times during the struggle and after he recovered it, it fired several times more (R. 378-381).

At the trial petitioner also related his history to the effect that he was born in Tennessee in 1917 (R. 355). He attended school through the third grade but could not read or write anything except his name (R. 358). Between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and in the shipyards as a welder (R. 359-60.) He met the decedent in the Fresno area, became intimate with her in 1953 and she bore a child which he claimed was his (R. 360-2, 406). Later in 1953 he left the Fresno

area, moved to Palermo where he owned a bar which he later sold and then worked for his brother in the used car business (R. 363, 393). He subsequently entered the used car business himself (R. 393). This business netted him between $8-13,000 per year (R. 395-7). He bought several lots, built houses on them and for a period of time lived in one of the houses with a woman named Jewel Spoon who helped him maintain his used car business (R. 363 6). In the course of this business he had employed various attorneys and engaged in law suits in Butte County (R. 394-5).

In 1956 Mrs. Atchley returned to Palermo, ousted Jewel Spoon from petitioner's home and business and moved in with her five children (R. 367). Later in 1957, petitioner and Mrs. Atchley married in Georgia but the marriage was not publicized in order to avoid a reduction in child welfare aid which Mrs. Atchley was receiving from the county (R. 371, 407). Prior to the shooting, Mrs. Atchley had complained to the police of petitioner and had also expressed her fears of him to others (R. 84, 107, 509-510).

At the trial, petitioner did not challenge the voluntariness of any statements given to the police or to Mr. Travers. He contended he could not remember the contents of them as at the time he was in a state of shock (R. 412-13, 415, 417); that he had no sleep Saturday, no sleep Saturday night, no sleep Sunday, and no sleep Sunday night until about 4 a.m. (R. 382); that he asked for a lawyer about ten times and

told them if he got an attorney he would tell the truth (R. 382).

On cross-examination, he admitted that when he returned from the shooting he had undressed and gone to bed (R. 400-401); that when he was brought into the jail his attitude was one of shock over the grievous thing that had happened to his wife and he readily volunteered to cooperate with the officers to find the person who had done it (R. 403); that after he was questioned he was allowed to sleep (R. 418-419); that he rejected breakfast and complained to the officers that he was allowed to sleep through it (R. 419); he further stated that his reason for asking for an attorney was to "preserve the evidence, the fingerprints off the gun to where they could check them" (R. 436).

The case was tried on the theory of murder which was deliberate and premeditated and also on the theory of murder perpetrated by means of lying in wait (R. 31-35). The jury was also instructed as to second degree murder (R. 35-6); manslaughter (R. 37-9); justifiable homicide (R. 42-3); self-defense (R. 43-6).[1] They concluded that petitioner was guilty of murder in the first degree (R. 4).

A separate trial was had to determine the punishment to be inflicted and all of the evidence adduced at the trial on the merits was offered and admitted (R. 559). After petitioner introduced evidence the

[1] Petitioner did not request instructions on admissions or confessions and none were given except a cautionary one (R. 26).

matter was submitted, the jury instructed and returned a verdict of a death penalty (R. 59).

On an automatic appeal at which petitioner was represented by counsel, the California Supreme Court affirmed the judgment and order denying the motion for new trial (R. 560-574). With respect to the alleged "confession" the court found that regardless of whether it was designated an admission or confession it must be voluntary to be admissible (R. 564-566); that the statement in question was shown to be voluntary and in an earlier conversation petitioner had volunteered substantially the same statement without being asked; that there were no threats or inducements offered for this statement; that although there was deception there was no mental coercion (R. 567); the court further held that the trial court erred in restricting defense counsel in eliciting evidence to the effect that petitioner complained of not being permitted to contact a lawyer but held that under the circumstances of the case it was not reversible error (Art. VI, Sec. 4½, California Constitution) (R. 567, 573-574).

SUMMARY OF ARGUMENT

The Supreme Court of the State of California found that the "confession" in question was not the product of threats or inducements. It was a repetition of an earlier conversation in which the petitioner had volunteered to his insurance agent the same statements without being asked. Petitioner did not contradict

this testimony. This finding should be given great weight by this Court.

Petitioner at the time of the killing was a mature man, successful in business and had the funds to and did hire his own counsel in the trial court of the state. This same counsel with petitioner's consent was appointed by the California Supreme Court to represent him upon appeal. Contrary to the coerced confession cases before this Court, the record does not show that petitioner was held incommunicado, subjected to police brutality, threats of mob violence, not arraigned within the proper time or that promises, threats or coercion were used to obtain his statements.

The state authorities did not cause petitioner to give any statements which were not freely self-determined. The present case is not within the purview of *Ashcraft* v. *Tennessee,* 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921 (1944); *Watts* v. *Indiana,* 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949); *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844 (1958); *Leyra* v. *Denno,* 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954) or *Spano* v. *New York,* 360 U.S. 315, 3 L.Ed. 2d 1265, 79 S.Ct. 1202 (1959).

A proper foundation was laid for the introduction of petitioner's statements in the trial court in which it was shown that they were not the product of improper police action but only a repetition of a previous spontaneous narration given to petitioner's insurance agent. These same statements were subsequently given to the police and again adopted by petitioner in his

testimony at trial. Petitioner did not choose to attack the foundation as to voluntariness laid in the trial court but on the contrary at the time of the argument to the jury his counsel stated that if the prosecution did not introduce these statements he would have.

The refusal of petitioner's request to contact counsel (which he had at that time not secured) did not render the taking of such statements by the police invalid per se. An overruling of the cases of *Crooker* v. *California*, 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958), would neither promote justice nor restrict improper activity of the police. It would penalize the innocent and confer additional benefits upon the guilty.

ARGUMENT

I. This Court in Re-evaluating the Question of the Voluntariness of the Confession Is Not to Completely Eliminate From Its Consideration the Determination Made by the State Courts

A state court's judgment of conviction should not be set aside where the practices of the prosecution including the police as one of its agencies do not offend what may be deemed civilized standards of the Anglo-American world (cf. *Fikes* v. *Alabama*, 352 U.S. 191, 1 L.Ed. 2d 246, 77 S.Ct. 281 (1957)).

The corrective power of this Court over state courts in criminal cases is narrower than that which it exercises over the lower federal courts (*Watts* v. *Indiana*, 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949)).

In exercising its responsibility to independently scrutinize the state court record, this Court is not bound to accept solely petitioner's version of the historical facts but will review the totality of circumstances involved, giving some weight to the conclusion of the state court. Petitioner's contention that this Court's examination is limited to petitioner's own statements, eliminating any conflicts therewith, is contrary to this Court's prior decisions. Only that evidence which is uncontradicted by the state in its version of the attendant circumstances is considered in determining whether there is a denial of due process (*Stein* v. *New York*, 346 U.S. 156, 181-182, 97 L.Ed. 1522, 73 S.Ct. 1077 (1953); *Thomas* v. *Arizona*, 356 U.S. 390, 2 L.Ed. 2d 863, 78 S.Ct. 885 (1958); *Ashdown* v. *Utah*, 357 U.S. 426, 2 L.Ed. 2d 1443, 78 S.Ct. 1354 (1958); *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958); *Crooker* v. *California*, 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958)).

The California Supreme Court in reviewing the objection to the Travers statement now challenged as a "coerced confession" stated: (53 Cal.2d 160, 170-1, 346 P.2d 764 (1959)) (R. 566-567).

> "Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insur-

ance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

* * * * *

"While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred."

This finding of the California Supreme Court is further supported by the position of counsel for petitioner at the trial of the matter. In his argument to the jury, counsel for petitioner stated: (R. 548-9)

". . . and I think when Jack Atchley was in there that first meeting at 10 o'clock and before they knew anything at all about a whole lot of these

things that you have heard here, that Jack Atchley did tell Travers definitely what occurred there. Now let me just—excuse me for a moment and I will pick up that statement. Now I asked and received through an order of this Court the entire statement that was given to the officers and I also—maybe by luck—this statement of Travers was in between and I was going to introduce this statement to you, Ladies and Gentleman, if the State had not put it in, I would have put it in. Now let me go over the important parts of this statement."

This language of petitioner's counsel demonstrates that he did not in fact believe the alleged confession was coerced and supports the determination of the California Supreme Court to this effect. Certainly if petitioner's counsel felt that the statement to Mr. Travers was coerced he would neither have relied upon it nor advised the jury that he would have introduced it in evidence if the prosecution had not. This conduct in no manner supports a claim of lack of due process on the part of the State of California in the use of such statements at the trial of the cause.

II. The Behavior of the State's Law Enforcement Officers Was Not Such as to Overbear Petitioner's Will to Resist and to Bring About Statements Not Freely Self-determined

Petitioner at the time of the shooting was 42 years of age (R. 352,355). He had several years successful experience in business as well as in agricultural activities, although he could not read or write (R. 359, 363-4,

366, 395, 397). He was of average intelligence and had no history of insanity or feeble-mindedness. He had previously employed attorneys for various actions in Butte County (R. 394-5). He was not held incommunicado by the police after his arrest but permitted to contact relatives and friends (R. 224, 354-5). His questioning by the police officers was not sustained over long periods of time without affording him food or sleep (R. 121-2, 126-27, 129-130, 401).

The murder was committed on the early morning of August 3. Although petitioner was questioned on August 3 and 4, there was approximately a twenty hour period without questioning prior to his first conversation with Mr. Travers. On August 4 at 6 p.m. petitioner requested Mr. Travers to come to the jail (R. 224). When Mr. Travers came at 10 a.m. on August 5 to bring some cigarettes and discuss the insurance policy on the decedent's life with petitioner in accordance with petitioner's request, petitioner voluntarily related the story of the shooting to him (R. 225, 232-233, 243). He also told Travers that he was endeavoring to secure an attorney (R. 233, 243-44).

As Mr. Travers left the jail he stopped to speak to the police and advised them of the statement (R. 224, 231). The police requested that he reinterview petitioner so that it could be recorded (R. 224, 234, 240). He agreed since he also needed some material for his insurance company (R. 224, 234, 240).

At noon, Mr. Travers returned. He made no threats, promises or inducements to petitioner (R. 225, 227,

247-248). He had the conversation which was taped (R. 226). Petitioner told the same story he had previously told Mr. Travers (R. 232, 241). Petitioner knew the material would be released (R. 224, 234, 240).

Another interview was not had with petitioner by the police until August 7 when he voluntarily told them the same story he had told Travers (R. 153-159, 164, 166-7).

Petitioner's own testimony contained in the record refutes his claim that he was not allowed to sleep for forty-eight hours during the first period of questioning (R. 418). It also refutes the fact that petitioner had engaged an attorney at any time during that period (R. 233, 243-4, 250). Further, the tape recording itself demonstrates that it was not replete with coarse or profane language but merely contained several instances of swearing (R. 196, 198).

Thus, it is submitted that the factual pattern here set forth is not comparable to that contained in petitioner's citations. The alleged confession was not obtained as the culmination of repeated and persistent questioning by relays of police officers over a period of a week or even thirty-six hours as in *Chambers* v. *Florida,* 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472, (1940), or *Ashcraft* v. *Tennessee,* 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921 (1944).

Petitioner was not a member of a minority race, a minor who was held incommunicado for long periods of time before his confessions were secured as were the petitioners in *Haley* v. *Ohio,* 332 U.S. 596, 92

L.Ed. 224, 68 S.Ct. 302 (1948), and *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844 (1958). In *Fikes* v. *Alabama,* 352 U.S. 191, 1 L.Ed.2d 246, 77 S.Ct. 281 (1957), the petitioner was an uneducated Negro of low mentality, if not mentally ill. He was jailed for investigation, questioned for several days then driven 55 miles away to a state prison where he was put in segregation and questioned continuously over a period of about nine days. During this time he made two confessions. Also an attorney who came to see him was turned away and he was only once allowed to see his father. Petitioner's treatment cannot be compared to that in the *Fikes* case.

In *Watts* v. *Indiana,* 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949), petitioner was arrested on suspicion, held without arraignment, without counsel, friends or advice as to his constitutional rights for nearly a week until he finally confessed to murder. Most of this time he was kept in solitary confinement and interrogated by relays of police officers until long past midnight. Clearly this is not the present case.

Nor do the cases cited by petitioner relating to the use of psychological coercion and gross deception apply here. In *Leyra* v. *Denno,* 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954), the petitioner was suspected of murdering his mother and father. He was questioned for three days intermittently and allowed to attend his parents' funeral. After two hours sleep he was again interrogated. He had been suffering from an acute sinus attack and had been promised medical

relief. The doctor who came was in fact a psychiatrist paid by the prosecution. This psychiatrist questioned him at length after giving him numerous assurances that he would be let off easily if he confessed. He confessed and made subsequent brief confessions to his partner and a formal confession to the police several hours after the confession to the psychiatrist. The state courts found the statement to the psychiatrist was the product of mental coercion and reversed the conviction. After a retrial and a second appeal, the state courts found the subsequent confessions were properly admitted. This Court in reviewing a federal habeas corpus proceeding in the case held the undisputed facts were irreconcilable with petitioner's mental freedom to confess or to deny a suspected participation in the crime. The confessions extracted in the same place within a period of five hours as the climax of days and nights of intermittent, intensive police questioning were held inconsistent with due process of law since the victim was physically and emotionally exhausted and his ability to resist interrogation was broken to almost trance-like submission by the use of arts of a highly skilled psychiatrist.

In the instant case Atchley was not persuaded to make his statements to Travers. Travers was not a doctor but an insurance agent. Petitioner knew the statements he was giving to Travers would not be held confidential. He knew these statements would be conveyed to the insurance company. He was not induced to make the statements to procure payment of the

proceeds of the insurance policy since the proceeds were payable to the decedent's children. Whether or not petitioner was anxious to obtain certain of the proceeds of the insurance policy for the one child that he claimed, this can hardly be considered in the same category as the inducement of medical treatment from the relief of intense pain as was promised in *Leyra* v. *Denno,* 347 U.S. 556, *supra.* At the first conversation, Atchley admittedly volunteered all statements to Travers relating to the shooting. At the second and recorded statement he did not change his story but told Travers the same tale. It can therefore hardly be urged that this second story was the product of such an overbearing of petitioner's will as to make the statement not freely self-determined.

Again in the case of *Spano* v. *New York,* 360 U.S. 315, 3 L.Ed.2d 1265, 79 S.Ct. 1202 (1959), the petitioner was indicted by a grand jury. Accompanied by his attorney he gave himself up after a bench warrant had issued for his arrest. When the authorities began questioning him, petitioner stated that he had been cautioned by his attorney not to speak. At one point he asked to contact his attorney. The request was denied. After the questioning proved futile, a childhood friend, a fledgling police officer was sent in to see him. This officer was instructed to tell petitioner that he might lose his job because of petitioner. Petitioner again asked for his attorney without success. A second and third session between the fledgling officer and petitioner were unsuccessful but at a fourth ses-

sion petitioner agreed to make a statement. The statement was completed at 4 a.m. This statement was found to be the result of petitioner's will having been overborne by official pressure, fatigue and sympathy falsely aroused "after considering all of the facts in their post-indictment setting."

Patently, the factual situation is not comparable to the instant case. While in the *Spano* case (360 U.S. 315, *supra*), the fledgling officer persuaded the petitioner to talk regardless of the advice he had received from his counsel, in the present case Atchley voluntarily related the facts of the shooting to Travers at the first conversation. He merely repeated this same story at the time of the tape recorded statement. Travers did not attempt to elicit information from Atchley at the tape recorded session, he merely directed the course of the conversation to cover the relevant material Atchley had previously given him. There is no evidence in the record nor did Atchley, himself, testify that Travers either promised him anything or made threats against him if he did not tell him the story. On the contrary, Atchley neither repudiated this story nor raised any question of its voluntariness when he testified at the trial in this matter.

The conduct of the law enforcement officials in this case patently was not such as to shock the sensitivities as was found to be present in *Rochin* v. *California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952), where this Court found the use of a ston h pump

to be abhorrent. It did not involve the use of brutality such as *Lee* v. *Mississippi*, 332 U.S. 742, 92 L.Ed. 330, 68 S.Ct. 300 (1948). It cannot be fairly compared to the psychological coercion applied in the cases of *Leyra* v. *Denno*, 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954), or *Spano* v. *New York*, 360 U.S. 315, 3 L.Ed. 2d 1265, 79 S.Ct. 1202 (1959). It has none of the attendant circumstances found in *Blackburn* v. *Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242, 80 S.Ct. 274 (1960), where we have a long showing of mental illness by petitioner prior to the commission of the offense, at the time of the offense, as well as at his apprehension and when the confessions were made.

Thus it is submitted that the record does not support the petitioner's contentions that the tape recorded statement in any manner constituted a coerced confession which would have vitiated the state court proceedings.

III. A Proper Foundation Having Been Laid in the Trial Court to Show That the Challenged Statements Were Voluntary, Their Admission in Evidence Did Not Constitute a Denial of Due Proces.

The California Supreme Court by its decision in *People* v. *Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959) (R. 560-574), has held that admissions as well as confessions must be voluntary to be admissible in evidence. With this standard in mind, it evaluated the statements complained of in the instant case and concluded that these statements were freely and vol-

untarily made (*People* v. *Atchley, supra,* at 169-171) (R. 560-574 at 565-6).

The California Supreme Court adopted a correct standard as to the admissibility of statements or confessions contrary to the Connecticut courts in *Rogers* v. *Richmond,* 40 O.T. 1960, ___ U.S. ___, 5 L.Ed. 2d ___, 81 S.Ct. ___.

In evaluating the criteria to be applied the California Supreme Court stated: (*People* v. *Atchley, supra,* at 170) (R. 566)

> "Involuntary confessions are excluded because they are untrustworthy, because it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (*People* v. *Berve,* 51 Cal.2d 286, 290, 293 [332 P.2d 97]; see *Watts* v. *Indiana,* 338 U.S. 49, 54 [69 S.Ct. 1347, 1357, 93 L.Ed. 1801]; *Lyons* v. *Oklahoma,* 322 U.S. 596, 605 [64 S.Ct. 1208, 88 L.Ed. 1481].) All these reasons for excluding involuntary confessions apply to involuntary admissions as well. (See *Oppel* v. *United States,* 348 U.S. 84, 90-92 [75 S.Ct. 158, 99 L.Ed. 101]; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 68.) Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily."

To the same effect see, *People* v. *Trout,* 54 Cal.2d 576, 354 P.2d 231, 6 Cal. Rptr. 759 (1960); *People* v. *Matlock,* 51 Cal.2d 682, 336 P.2d 505 (1959).

This standard is comparable to that set forth by this Court in *Rogers* v. *Richmond, supra,* wherein it is stated:

> "The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."

Here the record showed that Mr. Travers testified that he came to the jail on August 5 in response to a telephone call from petitioner asking him to bring some cigarettes and to talk about the decedent's insurance policy (R 224-6, 231). He had this conversation with petitioner at 10 a.m. on August 5 (R 224, 231). At this time petitioner of his own accord told him of the events on the night of the shooting (R 232-233, 246, 250). As Mr. Travers stated: (R 232)

> "A. No. Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time."

After this conversation and as Mr. Travers was leaving the jail, the undersheriff asked him if petitioner had said anything and he told the police officer that petitioner had told him what happened the morn-

ing of the shooting (R 224, 234). Then the officer asked if he would go back and talk with petitioner and whether he minded if that conversation was recorded (R 224, 234, 240). Mr. Travers stated he would not mind as he also had to have further information for his company (R 224, 234). This tape recording was of the second conversation which was just the same as the first (R 224, 225, 232). Mr. Travers further testified that he did not offer petitioner any threats, inducements, promises or anything to get him to talk to him and that he indicated to petitioner that the material petitioner gave him would be reported to his company (R 225, 226-7). The only notes Mr. Travers took of the second conversation were as to the ages of the children and the address of Jack's brother and sister whom petitioner wanted him to contact regarding one of the children (R 232-3).

Thus there was no question before the court that petitioner's statements were other than voluntary.

The petitioner did not take the stand and directly challenge the voluntariness of any of the statements he made to either the police or to Mr. Travers. He did take the stand at trial and state that he could not remember the contents of the statements because of shock, lack of sleep, and stated that he asked for an attorney but the request was not granted (R. 382, 412-3, 415, 417).

Petitioner at no time urged that he was not arraigned within the proper time, that he was subjected to any form of brutality by the police, that he was

questioned by relays of officers for undue periods of time, that he was held incommunicado or that he had secured counsel whom he wished to contact. On the contrary, the record discloses that petitioner suffered from none of these factors.

The statement complained of as "coerced" was merely a repetition of a prior one, admittedly voluntarily made by petitioner to Mr. Travers. The sole difference between the taped statement introduced as Peo. Ex. 34 (R. 194-201) and the prior statement was the fact the Peo. Ex. 34 was a statement in petitioner's own words made to Mr. Travers at the request of the police in order that it be recorded, unknown to petitioner. It does not appear that this factor in and of itself is sufficient to render such statement involuntary, particularly where, as here, petitioner on the stand at trial repeats the same story.

The independent testimony at trial fully corroborated the contents of the statement given to Mr. Travers as well as the statement given to the police by petitioner on August 7, 1958. In these statements and in his testimony, petitioner made the statement that he did not intend to kill the deceased but that the shooting was the result of a struggle for the gun.

These statements and testimony would clearly refute any contention that petitioner's will to resist was overborne by the police or by Mr. Travers allegedly acting as an agent of the police (cf. *Rogers* v. *Richmond,* 40 O.T. 1960, ____U.S. ____, 5 L.Ed.2d ____, 81 S.Ct. ____).

It should also be noted that petitioner as well as his counsel prior to trial had full opportunity to read and listen to petitioner's prior statements given to both the law enforcement officers as well as to Mr. Travers and therefore had full opportunity to prepare to contravert them at trial if in truth and in fact they were coerced in any manner (cf. *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed.2d 1523, 78 S.Ct. 1297 (1958)). This they did not do.

It is submitted that where as here the State affords to a defendant a full opportunity to challenge the voluntariness of his incriminating statements or confessions at a hearing outside the presence of the jury and again at the trial, a defendant may not fail to avail himself of this opportunity and then by unresponsive volunteered statements seek to properly urge a question of "coerced" confessions.

The entire record in this case including the position taken by counsel for petitioner in the trial court demonstrates that petitioner did not consider these statements as a "confession" (R. 213, 214-5, 216-7, 220; R. 5-17).

It is submitted that in the instant case there is no showing of a "wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and the sentence wholly void" (cf. *Brown* v. *Mississippi*, 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461).

Since a proper foundation was laid in the trial court for the introduction of the statements com-

plained of to show that they were voluntarily made by petitioner and freely self-determined (regardless of the prior California procedure on the subject of admissions) it is submitted that California has complied with this Court's standards and has not denied petitioner due process of law regardless of the denomination of such statements as confessions or admissions.

IV. The Principles Enunciated in Crooker v. California, 357 U.S. 433, and Cicenia v. LaGay, 357 U.S. 504, Should Be Applied in This Case

Petitioner asks this Court to review its prior decisions in *Crooker* v. *California,* 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay,* 357 U.S. 504, 2 L.Ed.2d 1252, 78 S.Ct. 1297 (1958). He now wishes the Court to conclude that the refusal of the police to refrain from questioning a suspect in a murder case until such suspect obtains counsel in and of itself is a denial of due process of law.

Petitioner would have every state denial of a request to contact counsel as an infringement of his constitutional rights without regard to the circumstances of the case. This is premised on the contention that the denial of the "guiding hand of counsel at every step in the proceeding against him" (*Powell* v. *Alabama,* 287 U.S. 45, 69, 77 L.Ed. 158, 53 S.Ct. 55 (1932)) is within the requirements of due process

of law as imposed upon the States by the Fourteenth Amendment (*Chandler* v. *Fretag*, 348 U.S. 3, 99 L.Ed. 4, 75 S.Ct. 1 (1954)).

Such a standard has not been laid down by this Court for federal prosecutions nor should this standard be imposed as a matter of constitutional compulsion (*Cicenia* v. *LaGay*, 357 U.S. 504, *supra*).

The refusal to permit police to contact suspects without the presence of their counsel will admittedly hamper law enforcement agencies in bringing the guilty to justice and will impose harsh penalties upon the innocent. If an innocent person may not voluntarily give an explanation to the police which will clearly exculpate him from any connection with the offense but must wait until he has first secured counsel he will be penalized. In the case of indigent defendants this would require their being held in jail until after the arraignment and counsel had been afforded to them by the court. Various states differ in their methods of appointment of counsel. Not all states provide counsel for indigents in other than capital cases. California however does. Patently, the adoption of such a rule as advocated by petitioner though affording full protection to the guilty will cause undue injury to the innocent as well as delay the prompt and efficient administration of justice.

This Court stated in *Crooker* v. *California*, 357 U.S. 433, *supra*, at 439-40.

"The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. See 1 Cooley's Constitutional Limitations (8th ed. 1927) 696-700; 2 Story on the Constitution (4th ed. 1873) § 1794. That right, secured in state prosecutions by the Fourteenth Amendment guaranty of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right to an accused to 'a fair opportunity to secure counsel of his own choice.' *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Chandler* v. *Fretag*, 348 U.S. 3 (1954).

"Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra,* but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). Cf. *Moore* v. *Michigan*, 355 U.S. 155, 160 (1957)."

Petitioner would have this Court hold that the denial by the police to a defendant of the right to be free from any questioning until he has his counsel present, in and of itself, denies him that fundamental fairness which is essential to the very concept of justice. This should not be the law nor does the factual

situation here present warrant the adoption of such a rule.

Petitioner infers that if the petitioner had been afforded counsel prior to seeing Mr. Travers he would have had no necessity for talking to him and hence the alleged coerced confession would not have been given. However, petitioner by his own statements merely wanted an attorney to preserve the fingerprints on the gun so they would substantiate the tale that he gave both Mr. Travers and at the trial. Petitioner as appears from the record originally volunteered to assist the police in apprehending the true culprit (R. 403). At that time he denied knowledge of the shooting, being at the scene or ever having a similar gun. This was when he was first questioned by the officers. He later changed this story after the gun was found on his premises and then admitted his first story was not true. When he first spoke to Mr. Travers, at which time there is no question but that Mr. Travers was *not* acting as a police agent, he gave Travers the same story petitioner later repeated at trial. Since petitioner regarded Mr. Travers as a friend and since petitioner voluntarily first told him this story, it does not appear that an inference may be drawn that he would not have seen Mr. Travers if petitioner had first had an attorney.

Further, petitioner in this case was not precluded from any attempts to secure an attorney. His brother was endeavoring to hire counsel for him (R. 354-355).

His brother was not prohibited from seeing petitioner or discussing his case with him (R. 354-355). At the time petitioner asked for counsel, the only showing made was that petitioner did not as yet have counsel of his own choice. This presents a far different situation than *Powell* v. *Alabama*, 287 U.S. 45, *supra*, where the whole bar was appointed to represent defendants who were friendless, in a strange county, threatened with mob violence and given no opportunity to secure counsel of their own choice. Again in *Cicenia* v. *LaGay*, 357 U.S. 504, *supra*, petitioner was indicted and accompanied by counsel of his choice when he surrendered. He was refused permission to contact this counsel while he was being interrogated. In *Crooker* v. *California*, 357 U.S. 433, *supra*, petitioner was refused permission by the police to arrange for a particular attorney. No showing was there made that he had anyone acting in his behalf as did petitioner herein.

Petitioner in the instant case was aware of his rights. His interview with Travers which is complained of as a coerced confession came after he had been arraigned and advised of his rights. Even had petitioner been represented by counsel and advised to make no statement, petitioner cannot now show this would have precluded him from answering or that he would have stated matters any differently than he did at the time of the trial.

Here petitioner did have counsel not only at the trial but at all the preliminary proceedings save the

period of investigation prior to the preliminary examination. Since his counsel prior to trial had available to him all petitioner's pretrial statements as well as the alleged confession he had full opportunity to prepare for trial and challenge this evidence on any permissible ground at the time of trial. On a review of this record it does not appear that petitioner's trial was in any manner infected with an absence of fundamental fairness within the meaning of the Fourteenth Amendment.

Under the due process rule of the Fourteenth Amendment, the restrictions placed upon states and their conduct toward defendants in criminal cases should not be made more stringent than those imposed by this Court upon the administration of justice under its supervisory power over the Federal Courts. This is the request made by the petitioner herein and we submit that neither reason nor justice requires this result.

It is submitted that the requirement of affording counsel to every suspect prior to being questioned by the police would preclude law enforcement from carrying out its functions to protect society. It would merely afford the guilty an opportunity to better conceal the fruits of their crimes and place heavy burdens upon state officials who are already working under heavy handicaps.

By petitioner's own testimony at the time of trial in the present action, the jury was warranted in im-

posing a death penalty upon him when it rejected his attempted explanation of the shooting. This was the same explanation that appeared in the statement given to Mr. Travers at the instance of the police, and voluntarily prior to that by petitioner. Thus, it can hardly be urged that the denial of a request to contact counsel or a refusal to halt investigations to permit petitioner to have counsel present occasioned the statements complained of.

Thus under the admitted facts of this case, it is apparent there is not presented to this Court a situation which would warrant the imposing of restrictions on state law enforcement officers more stringent than those imposed upon federal officers.

In the present matter there was no threat of mob hostility; no holding of a petitioner incommunicado; no subjection of the petitioner to brutality or threats of brutality; petitioner was neither a stranger in the community, friendless or removed from friends and family. He was not a minor, had previous experience with the law, had previously testified falsely under oath and had previously utilized attorney's services. Although he was illiterate, this in and of itself was offset by the fact that he had successfully maintained a business and managed to accumulate property. He had traveled over the United States and, although he originally may have come from a small mountain community, he had resided some twelve to fourteen years

in California subsequent to that time. His periods of questioning by the police were not continuous and there was at least a twenty hour respite before the claimed "confession" was given to Mr. Travers. The claimed "confession" was immediately preceded by one that was admittedly voluntary to the same individual and to the same effect. Even if petitioner had counsel, it cannot be said he would not have made a similar statement.

Thus, it is submitted that petitioner herein was not denied the "guiding hand of counsel at every step of the criminal proceedings" in such manner as would invalidate his conviction under the federal law.

CONCLUSION

Respondent submits that an examination of the state court record conclusively demonstrates that petitioner was fairly convicted pursuant to California law and that there was not an absence of "that fundamental fairness essential to the very concept of justice" which would bring the action within the purview of the Fourteenth Amendment and require a reversal by this Court.

It is respectfully submitted that the instant judgment should be affirmed or the writ of certiorari dis-

missed as improvidently granted (*Bullock* v. *South Carolina*, 78 O.T. 1960).

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as
JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA,

Respondent.

REPLY TO BRIEF OF RESPONDENT

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Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code, section 825:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of such prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any such officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of $500, to be recovered by action in any court of competent jurisdiction."

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as
JACK ATCHLEY,

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CALIFORNIA,

Respondent.

REPLY TO BRIEF OF RESPONDENT

Introductory

Petitioner has no wish unduly to add to the briefs herein. Yet, mindful of the fact that this is a capital case and that a man's life literally may hang in the balance, counsel feel an obligation not to let respondent's brief go unanswered. Hence this reply.

ARGUMENT

I.

The Tape Recorded Confession Was Elicited, by Means Proscribed by the Constitution, for the Sole Purpose of Insuring a Conviction.

Respondent relies heavily upon certain inferences which it would have this Court draw from evidence in the record: (1) the tape recorded statements must be voluntary be-

cause petitioner had previously had a similar conversation with Mr. Travers; (2) petitioner knew his statements would be released to the insurance company; (3) Travers did not attempt to elicit information but merely "directed the course of the conversation to cover relevant material Atchley had previously given him" (Resp. Br. 26).

The first two arguments are quickly answered; and as to number one, respondent is hoist by its own petard. If, without the taped statements, the State had made its case, with a completely voluntary confession from defendant, why was it not content to rest there? For what reason did the State instead decoy petitioner into making another statement and to record it without his knowledge? The mere fact that the statements were secured in the manner set out in petitioner's opening brief, pages 7-8, raises more than a mere aura of suspicion that the State deliberately set about, through the use of Travers, to delude defendant into making a confession which would more certainly bring about a conviction.

That petitioner knew his statements would be released to the insurance company lends no aid to respondent's position. Travers told Atchley several times (R. 195, 196, 198, 199)—warned him, if you will—that this would be so. Never once did he give warning either that the conversation was being recorded or that it would be used against him in a criminal prosecution. It is unnecessary to speculate whether Atchley could know that disclosure for insurance purposes, as he thought, could be used in evidence. The salient and revealing fact is that Travers, acting at the special request of the deputy sheriff and knowing that the conversation was being recorded, artfully directed Atchley's attention away from a criminal trial and toward the interest of the insurance company.

As to respondent's third point, we have no wish to engage in an argument of semantics as to whether Travers was "attempting to elicit information" or "merely directing the course of the conversation." We merely ask the Court to look to the questions he put and are content to rest with the conclusion reached by the Court. Omitting some of the irrelevant matter, Travers' questioning went like this (R. 195-201):

> "Can't understand it. Goofiest thing. This is really something. See, we are interested too how the darn—I mean, how it come about, you know, like you were telling me this morning, and I have got to write a letter to that— You were standing at the corner of the house? I won't write none of this down. I can remember. I don't want nothing on paper. Tell me something. She lunged. What did she do? When she walked up the walk what exactly did she do? Where was the gun actually at, Jack? Right in your belt? Did she get it out of your belt? Then what happened after she grabbed the gun out of your belt? (Bent her arm back) towards her again? In other words, you had the gun in your hand then? Well, I'll be darned. And then it went off twice more. Five times. Then she fell right there didn't she. That's too bad because I am going to have to write this up and send it in to the company. There is one point I should put in there too. Jack, what did you have the gun for in the first place? Where did your find the gun? Where was the gun? Yes, the gun that you had in your belt. Did you bring the gun over with you? Well, you had it with you all that evening and you brought the gun over? And had it in your belt and you waited— What did you have the gun in your belt for? For what purpose? She was running around with fellows? Oh I

see. God Almighty, that would make a guy feel sort of bad. Did you just plan on scaring her or scaring him? That was about what time? That's 2:00 a.m. in the morning she had not arrived home yet and you waited for her behind the house? And you had the gun in your belt. Did you make an attempt to pull the gun or anything? She seen the gun? Then what happened? Oh I'll be damned. Then you tried to get the gun away from her? That's when it happened. I think I got it pretty straight. Whose gun was it? Was it registered in your name? It wasn't even registered? Where did you buy it? What was his name? G. W.? And he lives on Honcut road or right in Honcut? Boy, oh boy. You got your cigarettes? I got to write this up to the company. We got to think of the children. I want this information. In other words, I mean just what you told me here now, let me see if it is exactly that way. You were supposed to go to a dance at 8:00 o'clock at Robinson's corner? All right. And you had other business to attend to? What type of business? 9:30 at night? Then you went back to Palermo? Where did you pick the gun up? You had the gun in the glove compartment? I see. And then what time did you go out to Gridley? Then you were with these fellows up to that time, the flat tire. How long did you wait for her? 25 minutes. About 2:20 you told me. So she got out of her car and she walked up the walk and she was by herself. I see. One hundred per cent, as far as the policy, I am almost positive. Like all policies, they have to be underwritten by the company. And I got to write all of this to the company and let them know just exactly what happened. So let me get it straight now. She got out of the car? Right in front of her? Now, did you have the— How was the gun— Right inside of your belt? I see. And

she could see it. In other words, the shirt wasn't over it? You had your shirt tucked in? So she saw the gun? Then what happened? You grabbed the gun with both hands? Where did the shells hit? And then what happened after the gun went off three times? And then you had the gun in your hand? Two times more. What did you do after that? Where did you park the car? Then you went home? What time did you get home about? What's this I heard about the— I mean, we have to send in the whole headline. They say they found a gun in your back yard buried. Did you bury it back there? What did you do with the holster? What time did the police arrest you? 4:00 o'clock. About an hour after you got home. Did you go home and just bury the gun right away? I know I read in the paper about where they got the gun buried in the back yard. . . . "

Parenthetically, petitioner does not feel able, from the record, either to agree with or forcefully to controvert respondent's claim that all of this was merely a repetition of what Atchley had previously told Travers. The record shows that Travers merely said the two conversations were about the same (R. 231, 232, 236, 246) and that they overlapped in his mind (R. 243), except that he asked more questions in the second (R. 236, 232); and this is not a strong basis for saying with certainty that nothing new was added in the second conversation, laden as it was with leading and suggestive questions.

Petitioner maintains that, in the totality of the circumstances shown by the record, the action of the State in securing the tape recorded confession in the manner shown is no mere innocuous thing, but is so inimical to our accusatorial system as to require a reversal.

II.

Whether a Defendant Has Been Denied Counsel Does Not Turn on Whether He Has Engaged an Attorney, nor Can the Voluntary Character of a Confession Be Determined by Looking to Nothing More Than the Presence or Absence of Threats or Promises.

Respondent would make capital of the fact petitioner had not engaged an attorney at the time of the questioning (Resp. Br. 22) and mistakenly maintains that petitioner's case is based upon the fact he did not have counsel of his choice (Resp. Br. 37). No such proposition is advanced. To state it succinctly, our position is that, in the circumstances of this case, despite his repeated requests, Atchley was denied an opportunity to contact counsel—not that he was prohibited from consulting any particular attorney. Atchley's testimony, which stands uncontroverted in the record, is that he "asked for a lawyer ten times . . . Everyone I talked to, I still asked them for a lawyer" (R. 382). It cannot be said, as respondent attempts to do (Resp. Br. 18), that petitioner is seeking to exclude any conflicts and confine the Court to Atchley's own statements. There is no conflicting evidence. Indeed, the California Supreme Court noted that this refusal to permit petitioner to talk to counsel suggests an intent to coerce, although it went on to find that such refusal alone would not have led the trial judge or jury to find that coercion in fact existed (R. 567). Nor do we ask this Court to find coercion from the fact, *standing alone*, that the authorities erected an effective barrier between Atchley and an attorney; but it is a potent factor to be considered with the other facts of the case.

Respondent overstates petitioner's contentions when it says we insist upon the right of an arrested man "to be free from any questioning until he has his counsel present"

(Resp. Br. 35). We merely say, as does California in its Penal Code (Sec. 825) that an arrested man has the right to be visited by an attorney at his request. It begs the question to say that Atchley had not engaged counsel (Resp. Br. 22). How can any man "engage" counsel if he cannot contact counsel? And that Atchley, or any other arrested person, may have relatives is inconsequential. The Penal Code section is in the disjunctive; and both its purpose and considerations of justice are the same. It is foreign to our way of thought that a man should be held at the mercy of the police without benefit of counsel. Certainly the police may question such a person before he has an attorney. But just as surely, he has a right to be apprised of his legal rights before answering questions, especially where—as here—he has expressed a desire for legal assistance, and more particularly where a confession is obtained by physical force or—as in this case—by treachery and deceit. It is a dangerously sophistic argument to say that to detain a man and to question him, not permitting him to call an attorney, would hamper and overburden law enforcement. Pleas of guilty easily secured by similar means, or the elimination of the appellate process might likewise lighten the burden of the courts. But such a philosophy is more attuned to the police state than to constitutional government and our concepts of justice. The protection of society remains the primary aim, and rightly so; but the protection of society does not require that the work of the police be made easier when the price is the constitutional rights of the members of that same society.

The record shows that Travers made no threats and held out no promises to Atchley. Petitioner does not claim otherwise. Nor is this a case of police brutality or threats of mob violence. But, while any of the enumerated factors would clearly render a confession induced thereby involun-

tary, there are other inducing causes which equally may operate to overcome the free will of a defendant, as was done in this case. Historically, too, this has been so. Bernardus Guidonis, the early historian of the Inquisition, has recorded that, as well as weakening the physical strength of the victims, moral subterfuges were also sometimes used to secure confessions, torture being the extreme expedient, and with confessions extorted in the torture chamber required to be subsequently "freely" confirmed. The facts in *Fikes* v. *Alabama*, 325 U.S. 191, 1 L. Ed. 2nd 246, 77 S. Ct. 281, reveal no threats or promises. Nor do they in the recent case of *Blackburn* v. *Alabama*, 361 U.S. 199, 4 L. Ed. 2nd 242, 80 S. Ct. 274, where the Chief Deputy Sheriff testified no one had threatened Blackburn in any way. The controlling principles are set out in *Ziang Sung Wan* v. *United States*, 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131:

> "The Court of Appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is voluntary as a matter of law if it is not induced by a promise or a threat, and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the Federal Courts the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was voluntarily made. A confession may be given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."

Even though *Ziang* was a case in the Federal Courts, subsequently decided cases dealing with the Fourteenth Amendment and elsewhere cited herein indicate that the same standards as to voluntariness will be applied to state court proceedings.

The citation of a number of cases is not particularly helpful; the facts of each case will necessarily vary (e.g., *Ziang* shows a much more brutal case than is here present), but the determinative standard remains the same: whether the accused, at the time of his confession, was possessed of mental freedom to confess or to deny commission of the crime. To say that only when he has been promised immunity or special consideration or has been threatened with violence is his free will overcome is to take a long step backward, socially as well as juridically.

III.

Giving Due Consideration to the State Court Decision, This Court Must Still Determine the Ultimate Constitutional Issues.

While it may be that factually this case differs from *Rogers* v. *Raymond*, 40 O.T. 1960, —— U.S. ——, 5 L. Ed. 2nd ——, 81 S. Ct. ——, in that it does not so clearly appear that the California court based its decision on improper criteria, yet this is not absolutely certain when the case is examined as an entirety. The California Supreme Court says (R. 566-567):

> "... Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted the testimony or suggested that any of his recorded statements were untrue.

> Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily."

When the California court refers to the fact that defendant did not suggest the untruth of his recorded statements, there arises the likelihood that they were, in fact, considering at least in part, the case by criteria held improper in *Rogers, supra,* i.e., truth or falsity; and the quoted statement shows also they relied upon a further criterion held insufficient in *Ziang, supra,* i.e., nothing more than threats or promises.

Moreover, the State court's finding that Travers' reference to insurance was for the purpose of "explanation" is not binding on this Court, where the question is not whether his statements were an "inducement" but whether they were the means of circumventing petitioner's free will by misleading him as to the real purpose of the conversation. Yet even the question of whether this was merely an explanation should be considered in light of the fact that Travers made no notations, save the names of the children (R. 232-233). If this were a legitimate explanation of the purpose of the interview, one would expect more legitimate insurance activity by Travers.

When the trial court listened to the tape in chambers, the prosecution said they expected merely to have Travers identify the tape, not to testify as to what had been said, and then to play it to the jury (R. 188). Counsel for defen-

dant objected, primarily upon the ground that these were privileged communications; but in the course of stating and arguing his motion, he urged also that they were not free and voluntary (R. 190). The trial court denied the motion, holding there was no privilege and the fact the statements were incriminatory did not render them inadmissible. The court refused to consider the question of voluntariness before hearing the tapes, saying that only if it was a "full-fledged" confession would the question arise and if they were admissions merely, it was merely a question of weight. The court also directed defense counsel not to renew his motion before the jury because "it gives a false impression" (R. 192), a caution which was later repeated (R. 221). In chambers an objection on the ground of voluntariness, or the lack thereof, was overruled (R. 213). The significant thing here is that the sole criterion offered by the prosecution and the sole test considered by the court was whether any threats or promises had been made (R. 216-217, 220); and the court refused consideration to the question of whether or not the defendant had had an attorney (R. 234) as a question for the jury. Indeed, the matter of threats or promises was the only foundation required or laid before the tape was played to the jury, other than Travers' conclusion that the statements were free and voluntary (R. 226); under the rule established in *Ziang, supra,* this was not enough. Incidentally, it is of little consequence whether defendant or his counsel considered the statements as a confession; but respondent is in error in stating that they did not (Resp. Br. 32). The opinions of the defense mean little here; regardless, counsel did clearly indicate that he so regarded the tape (R. 216, 217, 218, 220). It is not what the parties or counsel thought, nor what the trial court erroneously ruled; it remains for this Court to look to the facts—all of the facts—and determine whether due process is satisfied.

As the Court examines the facts, petitioner respectfully offers the following observations on some of respondent's contentions:

That petitioner would not have seen Travers if he had first been permitted to see an attorney (Resp. Br. 36). Such is not the contention; as was said in the opening brief, perhaps the need to see him would not have arisen, and almost certainly Atchley would not have made the damning statements had he had counsel. It is significant to note here that while Atchley's pleas to get an attorney were ignored, he was permitted personally to use the telephone to call Travers (R. 224, 231). Also going to show Atchley's enforced reliance upon Travers is the fact that he asked him to call his brother in regard to the welfare of his child (R. 233). If Atchley was not, in effect, held incommunicado from all but Travers, why was this necessary? Regardless of what an attorney might have done for him in this regard, there remains the question of why he did not call his brother directly. Atchley's statement that he wanted an attorney to get the fingerprints of the decedent from the gun (R. 382, 384) indicate his awareness that he was in need of legal assistance, and cannot reasonably be construed as a limitation of the purposes for which he sought such assistance.

That Atchley had previous experience with the law, had testified falsely under oath, and had previously utilized attorneys' services (Resp. Br. 39). Petitioner knows of no principle denying the benefits of the Fourteenth Amendment merely because one has previously committed perjury. Indeed, the protective cloak of Due Process has many times been thrown over those with a far longer prior criminal record. (See, e.g. *Chessman* v. *Teets*, 354 U.S. 156, 1 L. Ed. 2nd 1253, 77 S. Ct. 1127.) Neither Atchley's previous conviction of drunk driving (R. 357, 358) nor

his consulting various attorneys on business matters (R. 384-385) are material. There is no claim that he was in ignorance of his right to counsel. On the contrary, he attempted to exercise that right but was prevented by agents of the State from doing so. His previous experience would neither prevent nor off-set the overbearing of his will, accomplished by subterfuge; nor does it aid in determining whether he was denied the aid of counsel at a crucial stage, or whether the confession was the product of his free will.

That Atchley cannot now show that, had he been permitted to see counsel, it would have precluded him from answering or that he would have stated matters differently than he did at the trial (Resp. Br. 37). The answer is simply that petitioner is not required to make any such showing. Respondent apparently misconceives the effect of receipt of the challenged confession. If it is found—as petitioner maintains—that it was involuntary, then the entire trial is so tainted as to be so repugnant to the Constitution that not even the truth of the matters contained in the confession can serve to validate the conviction (*Rogers* v. *Raymond*, *supra*).

That Atchley did not question the voluntariness of the confession when testifying at the trial (Resp. Br. 26). As already shown, *supra* under par. II of Argument, this legal objection was raised by counsel. It is true that Atchley did not testify in so many words, "I did not voluntarily confess to Mr. Travers. I didn't know I was doing that. My free will was overcome." But what would such testimony have added? Such a self-serving conclusion would have aided neither the trial court or jury, nor even this Court. It is the facts which must determine; and the record sets forth the facts which show that Atchley's free will was overcome (Pet. Br. 6-9).

As already stated, petitioner has no intention of limiting this Court to a consideration of Atchley's testimony to the exclusion of contradictory evidence (Resp. Br. 18). The uncontroverted facts as to the denial of counsel and as to Travers' activities have been noted. It may be that respondent has reference to the evidence concerning the amount of sleep enjoyed by Atchley. Petitioner is content to refer to the opening brief, with this one addition: Atchley testified directly that he did not sleep during the time in question (R. 418-419, 415, 382). The State did not rebut this with evidence from anyone in a position to know, e.g., his keepers or cell-mates, but merely attempted to impeach him with a statement made to Mr. Lazere (R. 129).

That petitioner is not a member of a minority race, nor a minor (Resp. Br. 22). Granted. Granted also that such factors are significant in judging whether or not a confession has been illegally obtained. Perhaps it might be said by some that a Tennessee hill-billy is a member of a minority in northern California; but this is not a *sine qua non*. And surely respondent does not mean to infer that only a member of a minority race or one under legal age can so be denied the right to counsel, or so have a confession coerced from him against his will, or otherwise suffer deprivation of his right to due process, as to warrant action by this Court. As to Atchley's business ability, the opposing parties could endlessly reiterate their contrary views (e.g., Resp. Br. 39); but it is submitted that a fair summing up was given at the trial by a witness (R. 463) who described Atchley as knowing his way around in the used car business, where he could make a comfortable living.

Respondent would also urge that the tape recording must now be said to have been voluntary because of the fact that, in arguing to the jury, defense counsel said that

he himself would have introduced the tape had the prosecution not done so, and then discussed the confession. Apart from the utter immateriality of what counsel may have believed or said (as distinguished from what this Court determines), such argument belies the facts of legal trial life. Objection to the tape had been overruled, and it had been admitted in evidence and played to the jury (R. 237-238). Counsel's strategy was thus determined for him, in effect, by the prosecution. It would have been foolhardy ostrich-like to ignore the tape. He had to do what he could to mitigate its effect upon the jury; and the methods he chose have nothing whatever to do with the basic question of whether the confession was the product of defendant's free will.

Conclusion

Petitioner submits that the conduct of the State, bent upon securing a conviction, in extracting a confession from an unlettered man after he had been held and questioned, sleepless for 48 hours, through the medium of one whom the confessor thinks is acting in his interests but who, in questioning and permitting the recording of the confession, is acting at the request of the State Authorities, the confessor having been refused the benefit of legal counsel, so operates to prevent the exercise of free will that the confession is involuntary, in fact and within the purview of the Fourteenth Amendment, and the conviction based thereon cannot stand.

Dated: April 14, 1961.

Respectfully submitted,

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Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1960.

Veron Atchley, also known as Jack Atchley, Petitioner, v. California. | On Writ of Certiorari to the Supreme Court of California.

[May 1, 1961.]

Per Curiam.

After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.